No. 91-8674-CFY
Status: GRANTED

Title: John Angus Smith, Petitioner
v.
United States

Docketed:
June 19, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Kollin,Gary

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 19 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jul 16 1992		Order extending time to file response to petition until August 21, 1992.
5	Aug 18 1992		Brief of respondent United States in opposition filed.
6	Aug 20 1992		DISTRIBUTED. September 28, 1992
8	Oct 5 1992		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
9	Oct 9 1992	G	Motion of petitioner for appointment of counsel filed.
10	Oct 19 1992		Motion for appointment of counsel GRANTED and it is ordered that Gary Kollin, Esquire, of Ft. Lauderdale, Florida, is appointed to serve as counsel for the petitioner in this case.
11	Nov 23 1992		Joint appendix filed.
12	Dec 2 1992		Brief of petitioner John Angus Smith filed.
13	Dec 11 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals, Eleventh Circuit and U.S.District Court, S.Dist. of Florida (BOX)
14	Dec 21 1992		Brief of respondent United States filed.
16	Feb 4 1993		CIRCULATED.
15	Mar 3 1993		SET FOR ARGUMENT TUESDAY, MARCH 23, 1993. (2ND CASE).
17	Mar 23 1993		ARGUED.

91-8674

ORIGINAL

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioner John Angus Smith, pursuant to Rule 46.1 of the Supreme Court Rules, and respectfully moves for leave to file the accompanying Petition for Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Petitioner has been found financially unable to obtain counsel, and undersigned counsel was appointed to represent him pursuant to Title 18, U.S.C., Section 3006A; therefore the Petitioner relies upon Title 18, U.S.C., Section 3006(d)(6) and has not attached the affidavit which would have been otherwise required by Title 28, U.S.C., Section 1915(a).

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOHN ANGUS SMITH,

Petitioner,

v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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IN THE

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JOHN ANGUS SMITH,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

John Angus Smith respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case Number 91-5062 of that Court on April 8, 1992, which affirmed the judgment of the United States District Court for the Southern District of Florida.

QUESTIONS PRESENTED FOR REVIEW

ISSUE I

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR USE OF A GUN DURING AND IN RELATION TO A DRUG TRAFFICKING FELONY IN VIOLATION OF 18 U.S.C. SECTION 924(c)(1) BECAUSE THE FIREARM WAS USED AS AN ITEM OF BARTER, THAT IS, TO TRADE THE GUN FOR DRUGS.

ISSUE II

WHETHER THE FAILURE OF THE TRIAL COURT TO SUFFICIENTLY DEFINE THE MEANING OF USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME CONSTITUTED PLAIN ERROR.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the UNITED STATES OF AMERICA and JOHN ANGUS SMITH.

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OPINION BELOW

A copy of the Eleventh Circuit Court of Appeals judgment, reported at 957 F.2d 835, affirming the judgment of the District Court, is attached hereto as Appendix I.

BASIS OF JURISDICTION

The judgment giving rise to this Petition for a Writ of Certiorari was rendered April 8, 1992. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Defendant-Petitioner, John Angus Smith, will be referred to as the Defendant in this brief when his name is not used. The United States of America, the Plaintiff-Respondent, will be referred to as "the government." Pleadings and other documents in the record on appeal will be referred to by volume number, document file number, and page number. Transcripts will be referred to by volume number and page number.

Course of Proceedings and Disposition in the District Court

John Angus Smith was charged in a third superseding eight count indictment with (I) conspiracy to possess with intent to distribute cocaine, in violation of Title 21, United States Code, Section 846; (II) attempted possession with intent to distribute cocaine, in violation of Title 21, United States Code Section 841(a)(1) and Title 18, United States Code Section 2; (III) knowingly using an automatic firearm and silencer during and in relation to a drug trafficking crime, in violation of Title 18,

United States Code Section 924(c)(1); (IV) possession of firearms and ammunition as a convicted felon in interstate commerce, in violation of Title 18, United States Code Sections 922 (g)(1) and 924 (a)(2); (V) possession of unregistered automatic firearms, in violation of Title 26, United States Code Sections 5861(d) and 5871; (VI) possession of silencers without serial numbers, in violation of Title 26, United States Code, Section 5842; (VII) interstate transportation of a stolen motor vehicle, in violation of Title 18, United States Code Sections 2312 and 2; and (VIII) possession of firearms as a fugitive from justice in violation of Title 18, United States Code Sections 922 (g)(2) and 924 (a)(2). (R1:87).

Defendant's jury trial began on October 31, 1990 and concluded on November 7, 1990. (R:113, 115, 117, 118; R4-R7:90-613). Defendant's motions for judgment of acquittal at the close of the Government's case and after all evidence was presented were denied. (R6:542-558). On November 7, 1990, the jury returned a verdict of guilty as to all counts. (R2:118; R7:609-610).

On January 29, 1991, the Defendant was sentenced to a term of incarceration of 33 months as to counts 1, 2, 4, 5, 6, 7, and 8, each count to run concurrently and 360 months as to count 3 to run consecutively to all other counts. (R2:140). The defendant was also given three years supervised release. (R2:138).

STATEMENT OF THE FACTS

On December 27, 1989, John Angus Smith, arrived in Dania, Broward County, Florida. (R6:454). Traveling with him was Charles Roy Davis, the co-defendant in the case. (R6:460). Upon his arrival, Smith encountered Debbie Hoag, a known prostitute and drug user who was also a confidential informant for the Broward County Sheriff's Office. (R4:223-226, 260; R6:460-61).

Smith was in possession of an automatic MAC-10 firearm with a silencer. He wanted to trade that weapon for a quantity of cocaine and informed Hoag of that wish. (R4:203-4). Hoag claimed that she was going to contact a pawnbroker who she believed would be interested in purchasing the weapon. Instead, she contacted Robert Landeville, a detective for the Sheriff's Office, who pretended to be a pawnbroker. (R4:200, 3:41).

Landeville traveled to the Leo Motel where Smith, Davis, and Hoag were located. (R4:201-03; R6:463). Smith discussed the barter arrangement with Landeville and an agreed upon trade of two (2) ounces of cocaine for the gun was arranged. (R4:204). At trial, Landeville could only recall that Smith discussed trading the weapon for the cocaine. (R4:229). Davis, the co-defendant, who had entered a plea agreement, testified when called by the government, that Smith had also told Landeville that Smith was also interested in trading the gun for money. (R6:463-64). The government introduced a statement of the defendant into evidence in

which he stated he was trying to trade the gun for money to buy food. (R5:305).

Landeville left the motel ostensibly to obtain the cocaine for the trade. (R4:205). However, upon leaving he proceeded to contact other law enforcement officers who were involved in the matter including surveillance officers at the scene. (R4:212).

During this time period, Smith left the motel. When he left the motel room, he carried with him the black gun case that appeared to be the same one that had contained the MAC-10 gun displayed to Landeville. (R4:237; R6:466). In the motel room, Smith had presented a black gun case that contained the MAC-10 gun and a silencer to Landeville. (R4:204). There was no evidence presented that the MAC-10 gun was ever loaded including even when Smith was later apprehended. At the motel room, Smith had also displayed to Landeville a pistol which he had retrieved from his rear waistband area. (R4.205).

The black gun case was placed in his vehicle and Smith departed the area in the vehicle. (R4:237). The surveillance officers began following Smith and eventually attempted to pull him over. (R4:238). After a chase, Smith's vehicle was cornered. (R4:245). Smith raised his hands by the windows in a surrender posture, but the officers instead fired. (R4:246). Smith received wounds in his ear lobe, fingers, and leg. (R4:250, 277-78; R5:295-6). No weapon was ever pulled by Smith. The unloaded MAC-10 gun and silencer were found in the black zippered case in the van. (R5:323).

On the next morning, deputies of the Sheriff's Office obtained a search warrant and searched the vehicle that Smith was driving. (R5:312-13). Ammunition and numerous other weapons were found concealed within the vehicle. (R4:214-220; R5:312-366).

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR USE OF A GUN DURING AND IN RELATION TO A DRUG TRAFFICKING FELONY IN VIOLATION OF 18 U.S.C. SECTION 924(c)(1) BECAUSE THE FIREARM WAS USED AS AN ITEM OF BARTER, THAT IS, TO TRADE THE GUN FOR DRUGS.

In this case, the Government was unable to present substantial competent testimony to sustain a conviction of the charges of using a firearm during and in relation to a drug trafficking offense.

In the instant case, the MAC-10 gun alleged in Count III of the Indictment was displayed to Detective Landeville only once and solely for the purpose of bartering for two ounces of cocaine. (R4:204, 229). In fact, the defendant also offered to sell the gun outright instead of bartering it for the cocaine. (R5:305). At all other times, the gun remained securely encased in a gun bag and it was not loaded. (R4:204, 237; R5:323). At the time of the defendant's arrest, the gun remained within his vehicle and had not been removed from its case. (R5:323).

The factual situation of the instant case with regard to the MAC-10 gun is virtually identical to the situation in *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *rehearing en banc denied*, 895 F.2d 1281 (9th Cir. 1990) (Kozinski, J., dissenting to denial of hearing en banc) and cases cited therein.

In *Phelps, supra*, the appellant Marc Phelps offered to trade a MAC 10 illegally converted pistol for illegal drugs. The fact pattern of Phelps was described by the court as follows:

> Appellant Marc Phelps and his coconspirator Turnipseed needed a supply of ephedrine in the summer of 1987. They had an operative methamphetamine laboratory but needed one component, ephedrine, which was in short supply. Acting on an informant's tip, federal agent Fabriano negotiated with the conspirators and represented that he could supply the chemical if the price was right. At a later meeting, Fabriano was accompanied by Agent Paur, who agreed to pose as an associate and attempt to buy an automatic weapon.
>
> Phelps told the agents that he was an expert in guns and had experience in converting semi-automatic MAC 10 firearms to fully automatic mode. Agent Paur showed interest and asked to buy such a weapon. Phelps declined to make an outright sale but offered to give it to Paur on delivery of the first ten pound shipment of ephedrine. The automatic pistol was displayed and was unloaded and unregistered.
>
> The agents inspected the laboratory and weapon, obtained a search warrant, seized records and chemicals, and arrested Phelps and his coconspirator. Phelps was convicted by a jury of five counts, Count 5 being the charge of using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. Section 924(c)(1).

Phelps, supra, 877 F.2d at 29.

In the instant cause, the defendant displayed the MAC-10 weapon to undercover detective Landeville for the sole purpose of offering to trade it for two ounces of cocaine.

The *Phelps* court held:

> We conclude that the mere presence of a firearm does not trigger the statute. Congress directed the statute at "persons who chose to carry a firearm as an offensive weapon for a specific criminal act." Id. We apply the principle of lenity as we construe the ambiguous term "in relation to." See *Simpson v. United States*, 435 U.S. 6, 15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978); *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir. 1988). Here, the firearm did not have a role in the crime as an offensive weapon. The firearm was not used "in relation to" the crime as a weapon would normally be used. Because Phelps used the gun only for barter, his conduct is excluded by the statute.

Phelps, supra, 877 F.2d at 30.

The Government's entire case against Smith was predicated on this barter theory: opening argument (R4:182-93), testimony of Landeville (R4:198-234), testimony of co-defendant Davis (R6:442-491), and closing argument. (R6:571-588, 597-600).[1]

While the appellant had also displayed a pistol from his waistband and showed it to Landeville, the MAC-10 had only been displayed when discussing the barter arrangement and it had been returned to the gun case and zippered when the appellant left the motel. (R4:237; R5:466). When the officers eventually searched the vehicle, the gun was found still securely encased in the gun case which was zippered. (R5:323). It was not loaded. (R5:323).

Therefore, as in *Phelps, supra*, the gun was not used "in relation to an offense" where the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether or not such display or discharge occurred. There was insufficient evidence as a matter of law with regard to the MAC-10 gun to show that it was used in violation of 18 U.S.C. section 924(c)(1). To sustain Smith's conviction, this Court must be satisfied that the government proved beyond a reasonable doubt that the Defendant "did knowingly use a firearm, that is a MAC-10 machinegun serial no. SAP92690, fitted with a

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[1]Landeville and Davis were the only witnesses who saw Smith in actual possession of the MAC-10 and were the only witnesses who testified to any of Smith's conversations regarding the weapon. Hoag never testified.

silencer, during and in relation to the drug trafficking crimes set forth in Counts I and II." (R1:87). *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

The decision of the Court of Appeals for the Ninth Circuit in *Phelps, supra,* held that 18 U.S.C. Section 924(c)(1) was **NOT** intended to punish the use of a firearm as an item of barter in negotiating the purchase of a controlled substance. The decision of the Court of Appeals for the Eleventh Circuit in the instant case directly conflicts with the decision in *Phelps, supra*. In fact, the decision in the instant case formally rejects the holding in *Phelps:*

> We believe the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect.

United States v. Smith, 957 F.2d 835, 836 (11th Cir. 1992).

The government in choosing to charge Defendant Smith with a violation of 18 U.S.C. section 924(c)(1) took upon itself the burden of proving each and every element of the crime charged. The government never demonstrated that Defendant Smith carried the firearm in violation of section 924(c)(1). Because the government failed to prove essential elements of the crimes charged, the trial court erred in not granting Defendant Smith's motion for Judgment of Acquittal and his conviction must be reversed.

Since the Government failed to sustain its burden of proof, no reasonably minded jury should have found the Defendant guilty beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547 (5th Cir. Unit B.) *(en banc), aff'd on other grounds*, 462 U.S.

(1983). In *Bell*, 678 F.2d at 549, the court concluded that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or to be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt."

The evidence presented in the instant case was insufficient to permit the jury to draw the inference or connection between the evidence presented and the fact asserted. *See United States v. Henderson*, 693 F.2d 1030 (11th Cir. 1982). Failing to produce substantial evidence of the essential elements of the crimes charged requires reversal of the underlying conviction. *Henderson, supra*.

In the instant case, the Government has failed to show the Defendant's use of the alleged firearm in relation to a drug trafficking crime. The defendant's sole use of that firearm was for barter purposes, and accordingly this conduct does not violate 18 U.S.C. section 924(c)(1). *Phelps, supra.* In light of the failure of the Government to show this requisite element, the trial court erred in not granting a judgment of acquittal to the Defendant as to this element and, in turn, subsequently sentencing the Defendant under the mandatory minimum sentencing provisions of Section 924(c)(1) of Title 18 of the United States Code.

ISSUE II

THE FAILURE OF THE TRIAL COURT TO SUFFICIENTLY DEFINE THE MEANING OF USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME CONSTITUTED PLAIN ERROR.

The failure of the court to instruct the jury as to the limitation that a firearm used solely for barter does not violate 18 U.S.C. section 924(c)(1) was plain error. *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir. 1990); *see United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988).

The instruction given to the jury by the trial court did not fully explain the meaning of the phrase "in relation to," under 18 U.S.C. Section 924(c)(1). The instruction by the Court[2] with regard to the definition stated as follows:

> You may find a defendant used a firearm within the meaning of Section 924(c), that is, during and in relation to a drug trafficking felony, if you find that the firearm named in the count related to the defendant was an integral part of a drug trafficking crime as I have defined it. To be an integral part of such a crime, a firearm must be, first, present, second, available to the defendant in question, and third, in some way connected to the underlying drug trafficking crime.

Therefore, in addition to the sufficiency issue, the charge to the jury was deficient. The charge failed to properly define the term "in relation to" by omitting the holding of *Phelps, supra*. That is, the charge given omitted instructing the jury that the mere presence of a firearm does not trigger the statute, that the

[2]See appendix, Exhibit B.

firearm must have a role in the crime as an offensive weapon, and that the use of a weapon only for barter excludes that conduct as a violation of Section 924(c)(1). *Phelps, supra*. Pursuant to the plain error standard of Rule 52(b) of the Federal Rules of Criminal Procedure, the conviction for Count III must be reversed.

In *United States v. Solomon, supra*, the court analyzed the circumstance where a defendant does not request an instruction nor object at trial to the court's instruction. The court stated as follows:

> Rule 52(b) is a backstop protection against substantial injustice that might otherwise result from application of the usual rule, Fed.R.Crim.P. 30. That rule prohibits an appellate level complaint against a trial court's failure to furnish a particular jury instruction in absence of a request or objection at trial. An appellant asking the Court to reverse his conviction because of an omitted jury instruction must demonstrate that when considered in its entirety, the charge was so deficient that there is a "likelihood of a grave miscarriage of justice" point to an error so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings. In reviewing the trial court's jury instructions for plain error, the "touchstone is fundamental fairness."

United States v. Solomon, supra, 856 F.2d at 1577-78.

In the instant cause, the instruction fails to properly advise the jury as to the law. Instead, it essentially tells the jury that mere presence of the weapon during a drug trafficking crime violates the law.

Moreover, the facts of the instant cause fall outside *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985) and *United States v. Ramos*, 861 F.2d 228 (9th Cir. 1988), two cases distinguished in

Phelps, supra. *Phelps* also concluded that the fact patterns in those two cases were outside those of *Phelps*.

In *Stewart and Ramos, supra*, the Ninth Circuit stated that a firearm is used "in relation to" an offense if "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether such display or discharge in fact occurred." Like in *Phelps*, Smith's display of the unloaded weapon did not embolden him within the meaning of Stewart and Ramos. *Phelps*, 877 F.2d at 31.

Thus, the trial court should have charged the jury that a firearm used solely for barter does not violate 18 U.S.C. section 924(c)(1), *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), and that a firearm is used "in relation to" an offense if "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether such display or discharge in fact occurred."[3]

Fundamental fairness therefore mandates that this Court reverse the conviction of John Angus Smith for Count III, the

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[3]In the opinion in the instant case, the Court of Appeals for the Eleventh Circuit never reached this issue because of its ruling on the first issue. The opinion at 957 F.2d at 836 footnote 4, states:

> Because we disagree with the Ninth Circuit's decision that use in trade does not constitute use for purposes of section 924(c)(1), we find no merit to defendant's contention that he was entitled to such a jury instruction.

charged violation of 18 U.S.C. section 924(c)(1) for which he received a consecutive mandatory 30 year sentence. Absent the proper instruction in regard to a definition of "in relation to," the charge was so deficient that there is a likelihood of a grave miscarriage of justice.

CONCLUSION AND SUMMARY OF GROUNDS

FOR GRANTING CERTIORARI

The decision of the Eleventh Circuit in the instant case is in direct conflict with the Ninth Circuit over the use of a firearm as an item of barter in a drug transaction. In the instant case, the Eleventh Circuit holds "that trading guns for drugs constitutes the use of a drug trafficking offense in violation of 18 U.S.C. Section 924(c)(1)." In contrast, the Ninth Circuit has held "that a firearm used as an item of barter in a drug transaction was not used 'in relation to' the drug transaction." *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir. 1990).

For the foregoing reasons, Petitioner urges the Supreme Court to grant this Petition for Writ of Certiorari so the decision may be reviewed after full briefing.

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UNITED STATES of America, Plaintiff-Appellee,

v.

John Angus SMITH, Defendant-Appellant.

No. 91-5062.

United States Court of Appeals, Eleventh Circuit.

April 8, 1992.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 90-6020-CR-JCP, James C. Paine, J., of use of firearm during and in relation to drug trafficking felony, and he appealed. The Court of Appeals, Edmondson, Circuit Judge, held that trading guns for drugs was use of firearm during and in relation to drug trafficking offense.

Affirmed.

1. Weapons ⇐4

To establish violation of prohibition against using firearm during and in relation to drug trafficking felony, Government must show that defendant either actually or constructively possessed firearm and used or carried firearm during and in relation to drug trafficking offense. 18 U.S.C.A. § 924(c)(1).

2. Weapons ⇐4

To be found in violation of statute prohibiting use of firearm during and in relation to drug trafficking felony, it was not required that defendant's intention be to use weapon offensively; prohibition included any use of firearm in relation to drug trafficking crimes. 18 U.S.C.A. § 924(c)(1).

3. Weapons ⇐4

Conviction for use of weapon in drug trafficking offense may be upheld despite defendant's claim of nonbelligerent reasons for having weapon, as long as possession is integral part of and facilitates commission of offense. 18 U.S.C.A. § 924(c)(1).

4. Weapons ⇐4

Trading guns for drugs constitutes use of firearm during and in relation to drug trafficking offense; when drug purchasers trade drugs for guns, trade not only facilitates but becomes illegal drug transaction. 18 U.S.C.A. § 924(c)(1).

Gary Kollin, Law Offices of Gary Kollin, Ft. Lauderdale, Fla., for defendant-appellant.

Linda Collins Hertz, Lisa T. Rubio, Asst. U.S. Attys., Miami, Fla., David I. Mellinger, Asst. U.S. Atty., Ft. Lauderdale, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ATKINS *, Senior District Judge.

EDMONDSON, Circuit Judge:

Defendant John Angus Smith tried to trade a MAC-10 machine gun and silencer for cocaine. The question presented is whether the use of a firearm in trade for drugs supports a conviction under 18 U.S.C. § 924(c)(1) for using a firearm during and in relation to a drug trafficking felony.[1]

[1] To establish a violation of 18 U.S.C. § 924(c)(1) in this circuit, the government must show the defendant (1) either actually or constructively possessed the firearms, and (2) used or carried the firearms during and in relation to the drug trafficking offense. *United States v. Poole*, 878 F.2d 1389 (11th Cir.1989). Smith admits to possession of the gun, but claims that his attempted barter is not the kind of use in

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

1. Smith also claims the district court abused its discretion by admitting fingerprint identification cards into evidence and denying his motion to sever two counts of his indictment for separate trial. We find no merit to these claims and affirm the district court's decisions.

relation to drug trafficking prohibited by section 924(c)(1).

Smith relies on *United States v. Phelps*, 877 F.2d 28 (9th Cir.1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir.1990).[2] The defendant in that case had attempted to trade a MAC–10 for a chemical component he needed to manufacture an illegal drug, *Phelps*, 877 F.2d at 29; and the court decided that a firearm used as an item of barter in a drug transaction was not used "in relation to" the drug transaction. The *Phelps* court justified its conclusion by explaining that the defendant had no intention to use the firearm offensively, "as a weapon would normally be used." *Id.* at 30.[3]

We believe the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect.[4] The plain language of the statute supplies no such requirement, *see* 18 U.S.C. § 924(c)(1) (applying to "[w]hoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm ..."); *see also Phelps*, 895 F.2d at 1282–83 (Kozinski, J., dissenting); and in this circuit, the plain meaning of the statute controls "unless the language is ambiguous or leads to absurd results, in which case a court may consult the legislative history and discern the true intent of Congress." *United States v. Kattan-Kassin*, 696 F.2d 893, 895 (11th Cir.1983) (quoting *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir.1982)). We see no ambiguity in section 924(c)(1) and disagree with the conclusion that use in relation to a drug trafficking crime somehow excludes use in trade for drugs.[5]

Smith's argument (and that of *Phelps*) seems particularly puzzling in the light of our position that violations of section 924(c)(1) do not require that firearms be "fired, brandished, or even displayed during the drug trafficking offense."[6] *Poole*, 878 F.2d at 1393. Many courts have found firearm use even where the firearms could not be used offensively because they were out of reach of the defendant, *see Poole*, 878 F.2d at 1390 (weapons partially concealed in ceiling and under clothes on floor of utility room and defendant in other room); *Rosado*, 866 F.2d at 970 (loaded revolver in defendant's car a short distance away from scene of transaction sufficient to show firearm "use"); inoperable, *United States v. York*, 830 F.2d 885, 891–92 (8th Cir.1987), (no firing pin; cylinder and barrel improperly aligned), *cert. denied*, 484 U.S. 1074, 108 S.Ct. 1047, 98 L.Ed.2d 1010 (1988); or unloaded, *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir.1989) (defendant had no shells for unloaded shotgun mounted in truck window).

[2] More like this case are instances in which section 924(c)(1) convictions were upheld despite defendant's claim of non-belligerent reasons for having the weapon. *See United States v. Rivera*, 889 F.2d 1029, 1031 (11th Cir.1989) (defendant's status as police officer instructed to carry firearm at all times did not preclude his conviction under section 924(c)(1)), *cert. denied sub nom., Sud v. United States*, — U.S. —, 111 S.Ct. 93, 112 L.Ed.2d 65 (1990); *United States v. Payero*, 888 F.2d 928, 930 (1st Cir.1989) (defendant not entitled to have defense theory that he was carrying gun much as other people normally carry a wallet); *United States v. Meggett*, 875 F.2d 24, 26 (2d Cir.) (defendant claimed to be gun collector), *cert. denied sub nom., Bradley v. United States*, 493 U.S. 858, 110 S.Ct. 166, 107 L.Ed.2d 123 (1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989) (defendant claimed gun was for protection from muggers).

[3] The lesson of these opinions is that use may be established by evidence of possession—and Smith concedes possession of the MAC–10—"if possession is an integral part of and facilitates the commission of the drug trafficking offense." *Poole*, 878 F.2d at 1393. Although facilitation of the offense has often been interpreted to mean firearm use for protection of drugs, *see Meggett*, 875 F.2d at 29; *United States v. Matra*, 841 F.2d 837, 841–42 (8th Cir.1988); or for the protection and emboldening of the defendant, *see United States v. Brown*, 915 F.2d 219, 224 (6th Cir.1990); *United States v. Vasquez*, 909 F.2d 235 (7th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991); *United States v. Laing*, 889 F.2d 281, 289 (D.C.Cir. 1989), *cert. denied sub nom., Martin v. United States*, 494 U.S. 1008, 110 S.Ct. 1306, 108 L.Ed.2d 482 (1990); *Payero*, 888 F.2d at 929; *Rosado*, 866 F.2d at 970; we believe all that is needed is "an intent to use the weapon to facilitate *in any manner* the commission of the offense." *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting).

[4] When drug purchasers trade guns for drugs, the trade not only facilitates, but also becomes, an illegal drug transaction. We therefore conclude that trading guns for drugs constitutes use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

The conviction is AFFIRMED.

2. Smith suggests that this circuit adopted *Phelps* in *United States v. Poole*. His reading of *Poole* is incorrect; *Phelps* is cited in *Poole* only for the proposition that the mere presence of a firearm does not constitute use for the purposes of section 924(c)(1). *See Poole*, 878 F.2d at 1393. We agree that mere presence of a firearm is insufficient for a section 924(c)(1) violation, but we believe Smith's use of a firearm in trade for drugs constitutes more than that firearm's "mere presence" on the scene.

3. The government in *Phelps* conceded the absence of intent on defendant's part to use the weapon offensively; the government makes no such concession here.

4. Because we disagree with the Ninth Circuit's decision that use in trade does not constitute use for purposes of section 924(c)(1), we find no merit to defendant's contention that he was entitled to such a jury instruction.

5. We would reach the same conclusion if forced to confront the legislative history of section 924(c)(1). *See* S.Rep. No. 225, 98th Cong., 1st Sess. 314 n. 10, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3492 n. 10 (requirement that use be "in relation to" crime precluding statute application where firearm's "presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight"); *see also Phelps*, 895 F.2d at 1283–84 (Kozinski, J., dissenting) ("Congress used the broad term 'in relation to' precisely to avoid interpretive hair-splitting about peculiar and unexpected factual scenarios that might escape a more narrowly drawn definition"); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.) (Congress did not intend that statute be given a "cramped reading"), *cert. denied*, 493 U.S. 831, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989).

6. That the gun in this case was displayed is undisputed. The record is unclear as to whether it was loaded; but ammunition was readily accessible in the black case in which the gun was packed. Smith's MAC–10 had been modified to fire in a fully automatic mode capable of dispensing 950 rounds per minute.

Tommy J. MARBURY, Plaintiff-Appellant,

v.

Louis W. SULLIVAN, Secretary of Health and Human Services, Defendant-Appellee.

No. 91-7138.

United States Court of Appeals, Eleventh Circuit.

April 8, 1992.

Claimant sought social security disability benefits. Administrative law judge (ALJ) denied benefits, appeals council affirmed, and claimant appealed. The United States District Court for the Middle District of Alabama, No. 87-H-1053-E, Truman M. Hobbs, J., affirmed, and claimant appealed. The Court of Appeals held that: (1) expert testimony was required to determine whether claimant's limitations were severe enough to preclude him from performing wide range of light work, and (2) ALJ erred in evaluating claimant's testimony concerning his pain.

Reversed and remanded.

Johnson, Senior Circuit Judge, filed specially concurring opinion.

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IN THE

SUPREME COURT OF THE UNITED STATES

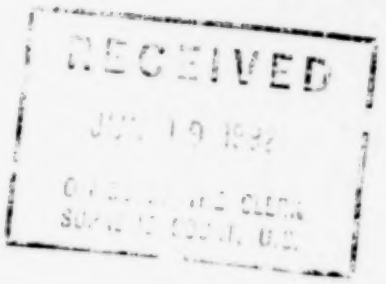
JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



CERTIFICATE OF SERVICE

I certify that on this 16th day of June, 1992, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

(1) Motion for Leave to Proceed in Forma Pauperis,

(2) Petition for Writ of Certiorari, and

(3) Certificate of Service,

were served by mail upon the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33130, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mail.

GARY KOLLIN, P.A.

By: _____
Gary Kollin, Esq.
Attorney for Petitioner
101 N.E. 3rd Avenue, Suite 302
Ft. Lauderdale, Florida 33301-1100
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ORIGINAL

No. 91-8674

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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JOHN ANGUS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 924(c)(1), which prohibits the use of a firearm "during and in relation to any * * * drug trafficking crime," embraces the exchange of firearms for narcotics.

2. Whether the district court committed plain error in instructing the jury on the elements of a Section 924(c) offense.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-8674

JOHN ANGUS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 835-837) is reported at 957 F.2d 835.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1992. The petition for a writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of

21 U.S.C. 846; attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); using an automatic firearm and silencer during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); possession of unregistered automatic firearms, in violation of 26 U.S.C. 5861(d); possession of unregistered silencers, in violation of 26 U.S.C. 5842; interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312; and possession of firearms by a fugitive from justice, in violation of 18 U.S.C. 922(g)(2).[1] He was sentenced to 393 months' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. Pet. App. 835-837.

1. The evidence at trial showed that on December 27, 1989, petitioner and his co-defendant offered to exchange a MAC-10 machine gun and a silencer for two ounces of cocaine. An informant introduced them to Detective Robert Landerville of the Broward County Sheriff's Office, who was posing as a pawnbroker. Gov't C.A. Br. 6-7. Petitioner said he had a MAC-10 machine gun for sale and that he wanted two ounces of cocaine in return for the weapon. Petitioner showed the machine gun to Landerville, who agreed to petitioner's proposition and then departed, stating that he would attempt to obtain the cocaine from his sources. Id. at 7. Later that evening, petitioner left his hotel room and was arrested after

[1] Petitioner's co-defendant Charles Roy Davis pleaded guilty to five counts of the indictment prior to trial and testified on behalf of the government at petitioner's trial.

a high speed chase. Id. at 8-10.

2. On appeal, petitioner argued that bartering a firearm for drugs does not constitute use of a firearm in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c), relying on the Ninth Circuit's holding to that effect in United States v. Phelps, 877 F.2d 28 (1989). The court of appeals rejected petitioner's interpretation of Section 924(c). Pet. App. 835-837. The court found that the plain language of the statute unambiguously encompassed exchanges of firearms for drugs, and accordingly declined to follow the Ninth Circuit's decision in Phelps. Id. at 836. The court further observed that it would have reached the same conclusion even "if forced to confront the legislative history of section 924(c)(1)." Id. at 836 n.5. In addition, the court held it is not necessary to fire, brandish, or even display a weapon during a drug trafficking offense in order to violate Section 924(c), and that "all that is needed is 'an intent to use the weapon to facilitate in any manner the commission of the offense.'" Id. at 837 (quoting United States v. Phelps, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc)).[2]

ARGUMENT

1. Petitioner renews his contention (Pet. 11-15) that 18 U.S.C. 924(c) does not apply to the use of a firearm as a medium of

[2] The court of appeals also rejected petitioner's claim that the trial judge should have instructed the jury not to convict him under Section 924(c) unless it found that he intended to use the weapon offensively. Pet. App. 836 n.4.

exchange in a narcotics transaction. He argues that certiorari is warranted because the decision below conflicts with the decision of the Ninth Circuit in United States v. Phelps, 877 F.2d 28 (1989).

a. Section 924(c) provides enhanced penalties for any person who "uses or carries" a firearm "during and in relation to any * * * drug trafficking crime." In United States v. Phelps, supra, a panel of the Ninth Circuit held that the exchange of a MAC-10 machine gun for drug component chemicals did not constitute the "use" of a firearm in relation to a drug trafficking offense within the meaning of Section 924(c). Relying on legislative history, the Ninth Circuit held that the statute's scope was limited to "'persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'" 877 F.2d at 30 (citation omitted).

As the court below recognized, the Ninth Circuit's reasoning is irreconcilable with the plain language of the statute, which broadly embraces any use of a firearm "during and in relation to" a drug trafficking offense. The requirement that the firearm be used in relation to the drug trafficking crime means simply that it must be used in some way to facilitate the predicate offense. Pet. App. 837; United States v. Harris, 959 F.2d 246, 261 (D.C. Cir. 1992), petitions for cert. pending, Nos. 91-8167, 91-8328, and 91-8333; United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), cert. denied, 484 U.S. 867 (1987). Nothing in the language of the statute restricts such usage to employment of the firearm as a weapon or precludes application of the statute in situations in which the firearm is used as a medium of exchange.

To the contrary, "[i]t is difficult to think of a term broader than 'in relation to' [and there is] no plausible interpretation of the phrase that would place [a participant in such an exchange] beyond the reach of section 924(c)." United States v. Phelps, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc). As the court below observed, "all that is needed is 'an intent to use the weapon to facilitate in any manner the commission of the offense.'" Pet. App. 837.

Because the plain language of the statute unambiguously encompasses the use of firearms as a medium of exchange in a drug transaction, recourse to legislative history is unnecessary. Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992); Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 n.3 (1989). In any event, nothing in the sparse legislative history of Section 924(c) supports petitioner's narrow construction of that statute.

When originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224, Section 924(c) applied to anyone who "use[d] a firearm to commit any [federal] felony" or who "carrie[d] a firearm unlawfully during the commission of a [federal] felony." In the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress revised that provision by deleting the requirement that the firearm be carried "unlawfully" and substituting the requirement that the firearm be used "in relation to" the underlying offense. The Senate Report accompanying the 1984 amend-

ment explains that Congress added the "in relation to" requirement because, having broadened the scope of the statute to include cases in which firearms were carried lawfully, it wished to preclude application of the statute where the presence of firearms "played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983). Thus, the legislative history of the 1984 amendment to Section 924(c) "reveals only that Congress meant to exclude from the sweep of section 924(c) those rare cases where the gun plays absolutely no part in the criminal activity because it is completely concealed and its presence at the scene of the crime is accidental. This is the antithesis of the situation presented here." United States v. Phelps, 895 F.2d at 1286 (Kozinski, J., dissenting from denial of rehearing en banc).

When Congress amended Section 924(c) in 1986 to extend its provisions to persons who use or carry a firearm in relation to a "drug trafficking offense" (see Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457 (1986)), the committee report accompanying the amendment made clear that its purpose was to fulfill "the need for more effective protection of law enforcement officers from the proliferation of machine guns and high-powered 'assault-type' weapons that are increasingly being used by criminals." H. R. Rep. No. 495, 99th Cong., 2d Sess. 7 (1986). In this case, the introduction of petitioner's machine gun into the drug transaction created precisely the risks that Congress sought to eliminate

through enactment of the 1986 amendment. See United States v. Harris, 959 F.2d at 262; United States v. Phelps, 895 F.2d at 1284-1285 (Kozinski, J., dissenting from denial of rehearing en banc).

Although the decisions of the court below and of the District of Columbia Circuit in United States v. Harris, supra, are in conflict with that of the Ninth Circuit in Phelps on the question whether a firearm exchanged for drugs is used "in relation to" a drug trafficking crime, further review by this Court to resolve the conflict is not warranted at this time. The Phelps panel was the first appellate court to address the question, and the Ninth Circuit remains sharply divided on the issue. See United States v. Phelps, 895 F.2d at 1282 (Kozinski, J., dissenting from denial of rehearing en banc). Since the decision in Phelps, the Eleventh Circuit in this case and the District of Columbia Circuit in United States v. Harris, supra, have reached the opposite conclusion, and thus there is a clear trend away from the position taken by the original Phelps panel. If, as seems likely, that trend continues, the Ninth Circuit may well reconsider its position, obviating any need for Supreme Court review. Accordingly, review at the present time would be premature.[3]

2. Petitioner also argues (Pet. 16-19) that the trial court committed plain error in failing to instruct the jury that use of

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[3] Should the Court wish to resolve the circuit conflict at this juncture, we suggest that this case would provide a better vehicle for addressing the question than would the petitions for certiorari in United States v. Harris (Nos. 91-8328 and 91-8167), because none of the present members of the Court participated in deciding this case in the lower courts.

a weapon solely for barter does not violate Section 924(c). We have already shown, however, that the statute in fact covers the type of conduct involved here. That being so, the trial court obviously did not commit error -- let alone plain error -- in its instructions on the Section 924(c) count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

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Attorney

AUGUST 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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JOHN ANGUS SMITH, PETITIONER	)	
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V	)	NO. 91-8674
	)	
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on August 17, 1992.

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Kenneth W. Starr
KENNETH W. STARR
Solicitor General

August 17, 1992

Supreme Court, U.S.
FILED
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No. 91-8674

In The

Supreme Court of the United States

October Term, 1992

JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 19, 1992
Certiorari Granted October 5, 1992

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TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 15, 1990 – Mr. Smith's third superseding indictment for eight charges including a violation of Title 18, United States Code, Section 924(c) in *United States v. John Angus Smith,* Case No. 90-6020-Cr-PAINE.

October 31, 1990 – Minutes of Jury Trial before Judge Paine in West Palm Beach, jury impaneled.

November 2, 1990 – Minutes of Jury Trial resumed on November 2, 1990 before Judge Paine in West Palm Beach, trial continued to November 6, 1990

November 6, 1990 – Court Instructions to the Jury

November 7, 1990 – Minutes of Jury Trial resumed before Judge Paine on November 6, 1990 in West Palm Beach, trial continued to November 7, 1990

November 7, 1990 – Minutes of Jury Trial resumed before Judge Paine on November 7, 1990, trial ends, verdict of guilty on counts 1 through 8, sentencing set for January 10, 1991

January 11, 1991 – Notice of Sentencing Date continued until January 18, 1991

January 18, 1991 – Mr. Smith sentenced to thirty three months as to counts one, two, four, five, six, seven, eight with each count to run concurrently and 360 months as to count three, the charge of violation of Title 18, United States Code, Section 924(c), which is to run consecutively to all other counts. Sentence of imprisonment to be followed three years supervised release as to counts one

through eight, each count to run concurrently with special condition of supervised release that Mr. Smith is not to possess any firearms. A $400.00 special assessment was ordered as to all counts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 90-6020-Cr-PAINE(s)(s)(s)
21 USC 841(a)(1)
21 USC 846
18 USC 2
18 USC 924(c)
18 USC 922(g)(1)
18 USC 924(a)(2)
26 USC 5861(d)
26 USC 5861(i); 5871
18 USC 2312
18 USC 922(g)(2)

UNITED STATES OF AMERICA

v.

JOHN ANGUS SMITH
_____/

SUPERSEDING INDICTMENT
(Filed September 27, 1990)

The Grand Jury charges that:

COUNT I

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

JOHN ANGUS SMITH and
CHARLES ROY DAVIS,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons unknown to the Grand Jury to possess with intent to

distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

COUNT II

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

did knowingly and intentionally attempt to possess with intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

COUNT III

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

did knowingly use a firearm, that is a MAC-10 machinegun, serial no. SAP92690, fitted with a silencer,

during and in relation to the drug trafficking crimes set forth in Counts I and II of this indictment, which are felonies prosecutable in a Court of the United States; all in violation of Title 18, United States Code, Section 924(c).

COUNT IV

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

having been convicted on or about November 18, 1965 in the Superior Court of the State of Arizona in and for the County of Pima, in Case No. 15033, of grand theft in violation of A.R.S., Sections 13-661 and 13-663, as amended, and in Case Nos. 14924 and 14925, of forgery in violation of A.R.S., Sections 13-421, which are each crimes punishable by imprisonment for a term exceeding one year, did knowingly possess firearms and ammunition, in and affecting commerce, to wit:

1. One RPB, .380 caliber, automatic M11-A1 pistol, serial #SAP3804104, and 78 rounds of .380 caliber ammunition.

2. One RPB, 9mm M10 pistol, serial #SAP92690, and 50 rounds of 9mm ammunition.

3. One 13" black and stainless 9mm silencer, no serial number, with black cloth sheath.

4. One 8¾" black .380 caliber silencer, no serial number, with black cloth sheath.

5. One Ruger .22 caliber long, semi-auto pistol, serial #19-21606, with 9" silencer permanently affixed, and 10 rounds of .22 caliber long ammunition.

6. One Grizzly Mark II, .45 caliber semi-automatic pistol, serial #BPP000147, and 20 rounds of .45 caliber ammunition.

7. One 5½" stainless silencer, no serial number, wrapped in black electrical tape, bearing the markings: "Maxim Silencer" PAT. MCH. 30, 1910-May 24, 1910 Made in Hartford CT., USA."

8. One Berretta, Model 92F, 9mm semi-automatic pistol, serial number C86952Z;

in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT V

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

did knowingly possess the firearms described below, which firearms were not then registered to the defendants in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code:

FIREARMS

One R.P.B. .380 caliber automatic M11-A1 Pistol, serial number SAP3804104

and

One R.P.B. 9mm automatic M10 pistol, serial number SAP92690;

all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNTS VI

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

did knowingly possess firearms, that is, the silencers described below, which firearms were not identified by a serial number as required by Title 26, United States Code, Section 5842, to wit:

FIREARMS

One 9mm silencer 13" by 1¾", One .380 caliber silencer 8¾" by 1¾"

and

One 9mm silencer 5½" by 1";

all in violation of Title 26, United States Code, Sections 5861(i) and 5871.

COUNT VII

On or about December 26, 1989, at Dania Beach, Broward County, in the Southern District of Florida, and elsewhere, the defendant,

JOHN ANGUS SMITH,

did knowingly and intentionally transport in interstate commerce a stolen vehicle, to wit, a 1988 Ford Van, VIN 1FBJS31H6JHB51775, knowing the same to have been stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

COUNT VIII

On or about December 27, 1989, at Dania Beach, Broward County, in the Southern District of Florida, the defendant,

JOHN ANGUS SMITH,

then being a fugitive from justice, having been charged by information on or about December 21, 1987 in the Circuit Court of the Eighteenth Judicial Circuit of the State of Florida in and for the County of Brevard, in Case No. 87-5419-CF-A-C, of Trafficking in Stolen Property in violation of Section 812.019, Florida Statutes, and Grand Theft by Buying and Receiving Stolen Property in violation of Sections 812.014(1) and 812.014(2)(c)(1), Florida Statutes, did knowingly possess firearms and ammunition, in and affecting commerce, to wit:

1. One RPB, .380 caliber, automatic M11-A1 pistol, serial #SAP3804104, and 78 rounds of .380 caliber ammunition.

2. One RPB, 9mm M10 pistol, serial #SAP92690, and 50 rounds of 9mm ammunition.
3. One 13" black and stainless 9mm silencer, no serial number, with black cloth sheath.
4. One 8¾" black .380 caliber silencer, no serial number, with black cloth sheath.
5. One Ruger .22 caliber long, semi-auto pistol, serial #19-21606, with 9" silencer permanently affixed, and 10 rounds of .22 caliber long ammunition.
6. One Grizzly Mark II, .45 caliber semi-automatic pistol, serial #BPP000147, and 20 records of .45 caliber ammunition.
7. One 5½" stainless silencer, no serial number, wrapped in black electrical tape, bearing the markings: "Maxim Silencer" PAT. MCH. 30, 1910-May 24, 1910 Made in Hartford CT., USA."
8. One Berretta, Model 92F, 9mm semi-automatic pistol, serial number C86952Z;

in violation of Title 18, United States Code, Sections 922(g)(2) and 924(a)(2).

A TRUE BILL

_____

FOREPERSON

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

(Caption Omitted In Printing)

Case No. 90-6020
Cr-PAINE

* * *

[198] THE COURT: Call your first witness, please, sir.

MR. MELLINGER: Detective Robert Landerville.

ROBERT LANDERVILLE, GOVERNMENT'S WITNESS SWORN

THE COURT: Please state your name.

THE WITNESS: Robert Landerville.

THE COURT: You may proceed.

MR. MELLINGER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MELLINGER:

Q How are you employed?

A I am a deputy sheriff with the Broward County [199] Sheriff's Office.

Q How long have you been employed in that capacity?

A As a law enforcement officer, I have been employed for approximately 20 years.

Q Have you always served with the Broward County Sheriff's Office?

A No, sir, I have been employed with the Sheriff's Office for a little over two years.

Q Where did you work before that time?

A Before that, I worked with the City of Dania in the police department.

Q Do you have an area of specialty as a Broward County Sheriff's Office detective?

A At the moment, I am working within the criminal investigation division, working burglaries, and gambling.

Q And could you describe for the ladies and gentlemen of the jury what your experience was when you were working for the City of Dania?

A I worked on numerous occasions as an undercover officer with the City of Dania assigned to the Broward Sheriff's Organized Crime Division, working bookmaking, vice and narcotics.

Q Were you employed with Broward Sheriff's office December 27, 1989?

A Yes, I was.

[200] Q Were you still in your current unit or area of specialty at that time?

A Yes, I was.

Q Can you describe what happened on the evening of December 27, 1989?

A Yes, at approximately 6:30 in the evening, I was sitting at my desk at my office, when I received a telephone call from a documented, reliable informant.

MR. KOLLIN: Objection, Your Honor, the issue of reliability.

THE COURT: Sir.

MR. KOLLIN: The issue of reliability.

THE COURT: Reliability?

MR. KOLLIN: Yes. He said documented, reliable.

THE COURT: I will overrule the objection. Go ahead.

THE WITNESS: Documented informant.

BY MR. MELLINGER:

Q What happened as a result of that contact?

A Based on the conversation, she related to me that she was residing at–

MR. KOLLIN: I object to hearsay.

THE COURT: The objection is sustained as to what the woman told you.

[201] BY MR. MELLINGER:

Q Who was the woman that called?

A Her name?

Q Yes.

A Her name was Debbie.

Q And did you take any action as a result of her telephone call?

A Yes, I did.

Q What did you do?

A My immediate action was to notify my supervisor, which is Sergeant Tony Varona, and I notified my partner, which is Detective Tony–correction, Detective Fondo.

Q What did you notify them about?

A I notified them we had two white males–

MR. KOLLIN: Objection, calls for a hearsay response.

THE COURT: Objection overruled.

THE WITNESS: We had to meet with an informant, and two white males at a motel where the sale of an automatic machinegun would take place.

MR. KOLLIN: I object again. This is coming solely from the conversation on the telephone. I move to strike.

THE COURT: Objection overruled.

BY MR. MELLINGER:

[202] Q Proceed.

A Approximately 30 minutes later, myself, and Detective Fondo, we responded to the motel, located 333 South Federal Highway in the City of Dania, known as Leo's Motel.

Q This motel in Broward County?

A Yes, it is.

Q Is that the Southern District of Florida?

A Yes.

Q And what did you do after arrived at that motel?

A On our arrival, I exited my vehicle, parked in front of room number 1, leaving Detective Fondo in the car to watch over me, make sure that nothing went down wrong. I approached room number 5, knocked on the door, this female, Debbie, opened the door, invited me in, and at that time, she introduced me to a man by the name of Mr. Smith.

Q Do you see that man in the courtroom here today?

A Yes, sir, I do.

Q Could you point him out, and describe what he is wearing.

A He is standing over here, wearing a gray jump suit, gray hair, and a mustache.

Q Is he standing or sitting?

A Sitting down.

MR. MELLINGER: May the record reflect that the witness has identified the defendant.

[203] THE COURT: Any objection?

MR. KOLLIN: No, Your Honor.

THE COURT: The record does reflect that.

MR. MELLINGER: Thank you.

BY MR. MELLINGER:

Q Were there any other individuals in the room?

A Yes, there was.

Q Did you learn the name of the other individuals, or individual that was in the room?

A Yes, I did.

Q And who was that?

A His name was Mr. Davis.

Q And what was Mr. Davis doing?

A Mr. Davis was sitting on the northside of the room at a table with both hands under the table in my direction.

Q What was his position with respect to yourself at that time?

A He was looking directly at me, and facing towards me.

Q How large a room was this motel room? Approximately?

A Approximately 12 by 12, maybe a little larger.

Q Okay.

What happened after you saw the defendant, and this Deborah, and the other individual that was in the room?

A Deborah introduced me to Mr. Smith, at which time we engaged into a short conversation. Mr. Smith

related to me [204] that he had an automatic MAC-10 machinegun with a silencer for sale. I asked him what he wanted in exchange for the automatic weapon, and he replied that he wanted two ounces of good cocaine. I advised Mr. Smith that I personally did not get involved with narcotics, that I was a pawn shop dealer, that I would have to make contact with a narcotic person to obtain the narcotics, and return within 45 minutes to an hour's time.

Q At the time you met Mr. Smith, you were posing as a pawn shop dealer, is that correct?

A Yes, that is correct.

Q Okay. Did Mr. Smith show you anything during the course of your meeting?

A Yes, on the table there was a black canvass [sic] bag which Mr. Smith retrieved the automatic weapon along with the silencer, and presented it to me. I viewed it, and looked at it. The silencer was detached from the weapon. I looked at it, and placed it back on the table, and at that time is when I asked him what he wanted in exchange for that, and he replied two good ounces of cocaine.

MR. MELLINGER: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. MELLINGER:

Q Detective Landerville, I place before you what is [205] marked Government Exs. 1A and 1D and 1C, and ask whether you can identify those exhibits?

A Yes, I can.

Q What are they?

A This is the weapon that was submitted to me by Mr. Smith along with this black canvass [sic] back bag, and the silencer.

THE COURT: What are the numbers assigned?

MR. MELLINGER: 1A, B, C, and D.

THE COURT: All right.

BY MR. MELLINGER:

Q Concerning Ex. 1C, which is attached to the weapon, was that on the weapon at the time you took a look at it?

A Yes, sir.

Q And what did Defendant Smith tell you about the gun that was contained in the bag?

A He told me that this was a fully automatic MAC-10.

Q Did you have any further discussion with Defendant Smith?

A Yes, after I mentioned to him that I would have to leave and obtain the narcotics from outside, he made a statement to me, looking directly at me, and he replied, "I like you, and I trust you."

At that time, he removed from the back of his waste [sic], a 9 millimeter automatic weapon, and placed it on top of [206] this bag on the table.

Q Detective Landerville, I place before you what is marked 3A, and ask whether you can identify that exhibit?

A Yes, I can.

Q What is that?

A This is the automatic weapon that he pulled from his wasteband after we had a conversation.

Q Is that an automatic, or semiautomatic?

A It may be a semiautomatic.

Q Did he tell you why he took that out?

A No, sir.

Q Did he tell you anything else?

A We engaged in a conversation after he stated he liked me and trusted me, and showed me a copy of a newspaper clipping showing how he was wanted, and how he had escaped law enforcement officers from the State of Tennessee.

Q And did you have an opportunity to take a look at that newspaper clipping?

A Yes, I did. He gave it to me. I read half of it, and then I returned it to him, and he told me to keep it. At that time, I took it, and I placed it in my jacket pocket.

Q Did he tell you who the newspaper clipping was about?

A Yes, he told me it was him. He escaped law enforcement agency from Tennessee.

[207] Q Concerning my previous question about whether one weapon was an automatic, and one was a semiautomatic, do you know the difference between semiautomatic and automatic?

A Not fully, no, sir.

Q What else happened while you were in the room?

A After we had gotten through our conversation, I left the room, and returned to my vehicle.

MR. MELLINGER: Your Honor, at this time, I would move for the admission into evidence of Government 1D, 1A, 1C, 2, and 3A.

THE COURT: Any objection?

MR. KOLLIN: May I voir dire?

THE COURT: Yes.

MR. KOLLIN: May I do that from here?

THE COURT: Yes, that would be fine.

VOIR DIRE EXAMINATION

BY MR. KOLLIN:

Q Mr. Landerville, you said earlier you didn't–you fully understand the difference between automatic and semiautomatic, did you say that?

A Yes, I did.

Q Now, you see these items before you, you didn't make any identifying marks on those items–on the items you saw in the room when you saw them, did you?

[208] A I couldn't, sir.

Q You didn't have the opportunity?

A That is correct.

Q So you cannot say, in fact, these are the same items that you saw in the room, but they appear to be the same items, is that correct?

A This is correct.

Q You don't know for certain these are the same ones you saw in the room?

A I am pretty sure they are.

Q You think they are?

A Yes.

Q But it could be you saw two Baretta pistols looking the same. Could you tell the one from in the room from the one not in the room?

A No, sir.

MR. KOLLIN: Your Honor, at this time, I object to the introduction of these items.

THE COURT: Overruled, 1A, C, D, 3A and 2 are received in evidence over objection of counsel for the defendant.

• • •

Case No. 90-6020
CR-PAINE

JURY INSTRUCTIONS

• • •

[13] The defendant is charged in Count 3 of the indictment with using a firearm as described in the indictment during and in relation to the drug trafficking crimes set forth in Counts 1 and 2 of the indictment.

Title 18, United States Code, Section 924(c) makes it a separate federal crime or offense for anyone to use a [14] firearm including a machinegun during and in relation to the commission of a federal drug trafficking felony.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the defendant committed either or both of the offenses charged in Count 1 or 2 of the indictment.

Second, that those offenses are drug trafficking crimes which are prosecutable as felonies in a court of the United States; and,

Third, that the defendant knowingly used the firearm described in the indictment while committing such drug trafficking crime.

You are instructed that the offenses charged in Counts 1 and 2 of the indictment, conspiracy to possession with intent to distribute cocaine and attempted possession with intent to distribute cocaine, are drug

trafficking crimes and felonies within the meaning of Section 924(c)(1).

Ownership is not an essential element of a violation of Title 18 United States Code Section 924(c), as charged in Count 4 of the indictment. Also, Section 924(c) does not require that a firearm be shown, displayed, brandished or fired.

You may find a defendant used a firearm within the [15] meaning of Section 924(c), that is, during and in relation to a drug trafficking felony if you find that the firearm named in the count related to the defendant was an integral part of a drug trafficking crime as I have defined it.

To be an integral part of such a crime, a firearm must be, first, present, second, available to the defendant in question, and third, in some way connected to the underlying drug trafficking crime.

I emphasize that Count 3 is distinct from Counts 1 and 2 of the indictment. If you find a defendant is not guilty of either Counts 1 or 2, then, you must also find him not guilty of the applicable firearms count. If, however, you find the defendant guilty of either Count 1 or Count 2, then, you must proceed to consider whether he is also guilty of the firearms count applicable to that defendant.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6020-Cr-Paine

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN ANGUS SMITH,

Defendant.

SUA SPONTE ORDER REGARDING CONVICTION AND SENTENCE AS TO COUNT 8

On January 18, 1991, sentence was imposed on defendant, John Angus Smith, following jury verdicts of guilty on Counts 1, 2, 3, 4, 5, 6, 7 and 8 of the Indictment. Sentences were properly imposed as to Counts 1 through 7. However, as to Count 8, defendant objected to being sentenced on both of Counts 4 (possession of a firearm by a convicted felon) and 8 (possession of the identical firearms by a fugitive from justice). Sentence was withheld as to Count 8 on the authority of *United States v. Winchester*, 916 F.2d 601, (11th Cir. 1990). This court has reconsidered that ruling, *sua sponte*, and concludes that it was in error. The *Winchester* case held that *consecutive* sentencing for possession of a firearm by a felon and possession of a firearm while a fugitive from justice arising out of the same incident is not permitted by 18 U.S.C. §922(g)(1, 2). This decision does not preclude concurrent sentencing for these offenses. It is apparent that his court misconstrued the holding of the *Winchester* case on the date of imposition of sentence. Therefore, the Judgment which is

entered in this case simultaneously with this order properly reflects concurrent sentences as to Counts 4 and 8 of 33 months. Should either party move for resentencing, the motion will be granted. In the absence of such a motion, the Judgment as written will prevail over the sentence as stated on the date of its imposition.

DONE and ORDERED at West Palm Beach, Florida this 29th day of January, 1991.

/s/ James C. Paine
United States District Judge

cc: Gary Kollin, Esq.
David Mellinger, AUSA
Probation
U.S. Marshal

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

JOHN ANGUS SMITH
usm# 28646-004

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number:
90-6020-Cr-PAINE-(01)
Gary Kollin, Esq.
2300 E. Las Olas Blvd.
#2-E
Fort Lauderdale, FL 33301

Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____

X was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7 and 8 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

(See Page Two for listing of offenses)

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

_ Count(s) _ (is) (are) dismissed on the motion of the United States

X It is ordered that the defendant shall pay a special assessment of $--400.00-- for count(s) 1, 2, 3, 4, 5, 6, 7 and 8, which shall be due X immediately _ as follows:

It is further ORDERED AND ADJUDGED that Attorney Gary Kollin has been appointed to represent the defendant for purpose of appeal.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 527-60-3493

Defendant's Date of Birth: 04/30/43

Defendant's Mailing Address:

2711 Sutherland Avenue
Knoxville, Tennessee 37919

Defendant's Residence Address:

_____

_____

January 18, 1991
Date of Imposition of Sentence

James C. Paine
Signature of Judicial Officer

James C. Paine, U.S. Dist. Judge
Name & Title of Judicial Officer

January 29, 1991.
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	Conspiracy to Possess with Intent to Distribute Cocaine.	12/27/89	ONE
21 USC 846 18 USC 2	Attempted Possession with Intent to Distribute Cocaine.	12/27/89	TWO
18 USC 924(c)	Use of a Firearm During and in Reference to a Drug Trafficking Crime.	12/27/89	THREE
18 USC 922(g)(1) and 924(a)(2)	Possession of a Firearm by a Convicted Felon.	12/27/89	FOUR
26 USC 5861(d) & 5871	Possession of Unregistered Firearms.	12/27/89	FIVE
26 USC 5861(i) and 5871	Possession of Unregistered Firearms.	12/27/89	SIX
18 USC 2312 and 2	Interstate Transportation of a Stolen Motor Vehicle.	12/26/89	SEVEN

18 USC 922(g)(2) and 924(a)(2)	Possession of Firearms by a Fugitive from Justice.	12/27/89	EIGHT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-THREE (33) MONTHS as to each of Counts 1, 2, 4, 5, 6, 7 and 8 said counts to ron [sic] currently with each other and

THREE HUNDRED SIXTY (360) MONTHS as to Count 3, said count to run consecutively to all other counts.

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States marshal.

_ The defendant shall surrender to the United States marshal for this district.

_ at ___ a.m. / p.m. on _____.

_ as notified by the United States marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on _____.

_ as notified by the United States marshal.

_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _ to _ at _, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to each of Counts 1, 2, 3, 4, 5, 6, 7, and 8, said counts to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation. It shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions.

X The defendant shall report in person to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

TITLE 18 USC SECTION 3553(c) STATEMENT

The Court has considered the statements by all parties and has thoroughly reviewed the presentence report. Although the Court has noted the seriousness of this offense, it is believed that the minimum guideline sentence in this case will serve as adequate punishment and deterrence. Accordingly, a sentence at the lower end of the guideline has been imposed. Further, it is the finding of the Court that the defendant is not able to pay a fine. Therefore, no fine has been imposed.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphanalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

total sentence: 393 months imprisonment, 3 years supervised release and $400.00 assessment fee.

UNITED STATES of America.
Plaintiff-Appellee,

v.

John Angus SMITH, Defendant-Appellant

No. 91-5062

United States Court of Appeals
Eleventh Circuit

April 8, 1992

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

EDMONDSON, Circuit Judge:

Defendant John Angus Smith tried to trade a MAC-10 machine gun and silencer for cocaine. The question presented is whether the use of a firearm in trade for drugs supports a conviction under 18 U.S.C. § 924(c)(1) for using a firearm during and in relation to a drug trafficking felony.[1]

To establish a violation of 18 U.S.C. § 924(c)(1) in this circuit, the government must show the defendant (1)

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*Honorable C.Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] Smith also claims the district court abused its discretion by admitting fingerprint identification cards into evidence and denying his motion to sever two counts of his indictment for separate trial. We find no merit to these claims and affirm the district court's decisions.

either actually or constructively possessed the firearms, and (2) used or carried the firearms during and in relation to the drug trafficking offense. *United States v. Poole*, 878 F.2d 1389 (11th Cir.1989). Smith admits to possession of the gun, but claims that his attempted barter is not the kind of use in relation to drug trafficking prohibited by section 924(c)(1).

Smith relies on *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir.1990).[2] The defendant in that case had attempted to trade a MAC-10 for a chemical component he needed to manufacture an illegal drug, *Phelps*, 877 F.2d at 29; and the court decided that a firearm used as an item of barter in a drug transaction was not used "in relation to" the drug transaction. The *Phelps* court justified its conclusion by explaining that the defendant had no intention to use the firearm offensively, "as a weapon would normally be used." *Id.* at 30.[3]

We believe the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is

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[2] Smith suggests that this circuit adopted *Phelps* in *United States v. Poole*. His reading of *Poole* is incorrect; *Phelps* is cited in *Poole* only for the proposition that the mere presence of a firearm does not constitute use for the purposes of section 924(c)(1). *See Poole*, 878 F.2d at 1393. We agree that mere presence of a firearm is insufficient for a section 924(c)(1) violation, but we believe Smith's use of a firearm in trade for drugs constitutes more than that firearm's "mere presence" on the scene.

[3] The government in *Phelps* conceded the absence of intent on defendant's part to use the weapon offensively; the government makes no such concession here.

incorrect.[4] The plain language of the statute supplies no such requirement, *see* 18 U.S.C. § 924(c)(1) (applying to "[w]hoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm . . . "); *see also Phelps*, 895 F.2d at 1282-83 (Kozinski, J., dissenting); and in this circuit, the plain meaning of the statute controls "unless the language is ambiguous or leads to absurd results, in which case a court may consult the legislative history and discern the true intent of Congress." *United States v. Kattan-Kassin*, 696 F.2d 893, 895 (11th Cir.1983) (quoting *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir.1982)). We see no ambiguity in section 924(c)(1) and disagree with the conclusion that use in relation to a drug trafficking crime somehow excludes use in trade for drugs.[5]

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[4] Because we disagree with the Ninth Circuit's decision that use in trade does not constitute use for purposes of section 924(c)(1), we find no merit to defendant's contention that he was entitled to such a jury instruction.

[5] We would reach the same conclusion if forced to confront the legislative history of section 924(c)(1). *See* S.Rep. No. 225, 98th Cong. 2d Sess. 314 n. 10, *reprinted in* 1984 U.S. Code Cong. & Admin.News 3162, 3492 n.10 (requirements that use be "in relation to" crime precludes statute application where firearm's "presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight"); *see also Phelps*, 895 F.2d at 1283-84 (Kozinski, J., dissenting) ("Congress used the broad term 'in relation to' precisely to avoid interpretive hair-splitting about peculiar and unexpected factual scenarios that might escape more narrowly drawn definition"); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.) (Congress did not intend that statute be given a "cramped reading"), *cert. denied*, 493 U.S. 837, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989).

Smith's argument (and that of *Phelps*) seems particularly puzzling in the light of our position that violations of section 924 (c)(1) do not require that firearms be "fired, brandished, or even displayed during the drug trafficking offense."[6] *Poole*, 878 F.2d at 1393. Many courts have found firearm use even where the firearms could not be used offensively because they were out of reach of the defendant, *see Poole*, 878 F.2d at 1390 (weapons partially concealed in ceiling and under clothes on floor of utility room and defendant in other room); *Rosado*, 866 F.2d at 970 (loaded revolver in defendant's car a short distance away from scene of transaction sufficient to show firearm "use"); inoperable, *United States v. York*, 830 F.2d 885, 891-92 (8th Cir.1987), (no firing pin; cylinder and barrel improperly aligned), *cert. denied*, 484 U.S. 1074, 108 S.Ct. 1047, 98 L.Ed 2d 1010 (1988); or unloaded, *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir.1989) (defendant had no shells for unloaded shotgun mounted in truck window).

More like this case are instances in which section 924 (c)(1) convictions were upheld despite defendant's claim of non-belligerent reasons for having the weapon. *See United States v. Rivera*, 889 F.2d 1029, 1031 (11th Cir. 1989) (defendant's status as police officer instructed to carry firearm at all times did not preclude his conviction under section 924 (c)(1)), *cert. denied sub nom. Sud v. United States*, ___U.S.___, 111 S.Ct 93, 112 L.Ed.2d 65 (1990);

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[6] That the gun in this case was displayed is undisputed. The record is unclear as to whether it was loaded; but ammunition was readily accessible in the black case in which the gun was packed. Smith's MAC-10 had been modified to fire in a fully automatic mode capable of dispensing 950 rounds per minute.

United States v. Payero, 888 F.2d 928, 930 (1st Cir.1989) (defendant not entitled to have defense theory that he was carrying gun much as other people normally carry a wallet); *United States v. Meggett*, 875 F.2d 24, 26 (2d Cir.) (defendant claimed to be gun collector), *cert. denied sub. nom., Bradley v. United States*, 493 U.S. 858, 110 S.Ct. 166, 107 L.Ed.2d 123 (1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989) (defendant claimed gun was for protection from muggers).

The lesson of these opinions is that use may be established by evidence of possession–and Smith concedes possession of the MAC-10–"if possession is an integral part of and facilitates the commission of the drug trafficking offense." *Poole*, 878 F.2d at 1393. Although facilitation of the offense has often been interpreted to mean firearm use for protection of drugs, *see Meggett*, 875 F.2d at 29; *United States v. Matra*, 841 F.2d 837, 841-42 (8th Cir. 1988); or for the protection and emboldening of the defendant, *see United States v. Brown*, 915 F.2d 219, 224 (6th Cir.1990); *United States v. Vasquez*, 909 F.2d 235 (7th Cir. 1990), *cert. denied*, ___U.S.___, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991); *United States v. Laing*, 889 F.2d 281, 289 (D.C.Cir.1989), *cert. denied sub nom, Martin v. United States*, 494 U.S. 1008, 110 S.Ct. 1306, 108 L.Ed.2d 482 (1990); *Payero*, 888 F.2d at 929; *Rosado*, 866 F.2d at 970; we believe all that is needed is "an intent to use the weapon to facilitate *in any manner* the commission of the offense." *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting).

When drug purchasers trade guns for drugs, the trade not only facilitates, but also becomes, an illegal drug transaction. We therefore conclude that trading guns for drugs constitutes use of a firearm during and in

relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

The conviction is AFFIRMED.

Supreme Court of the United States

No. 91-8674

John Angus Smith,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 5, 1992

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

No. 91-8674

In The

Supreme Court of the United States

October Term, 1992

JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the act of offering a firearm, solely as an item of barter, in trade for drugs violates Title 18, United States Code Section 924(c)(1), for use of a firearm during and in relation to a drug trafficking felony.

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OPINION BELOW

Opinion of Eleventh Circuit Court of Appeals is reported at 957 F.2d 835 (1992). J.A. 33.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1992. The petition for certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Title 18 U.S.C. § 924 (c)(1) and (2) provide:

(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment

for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

STATEMENT OF THE CASE

On December 27, 1989, John Angus Smith, ("Petitioner") encountered, a known prostitute and drug user who was also a confidential informant for the local Sheriff's Office. T. 223-226, 260, 460-61.

Petitioner was in possession of an automatic MAC-10 firearm with a silencer. J.A. 16. He wanted to trade that

weapon for a quantity of cocaine and informed the prostitute *qua* confidential informant of that wish. The confidential informant claimed that she was going to contact a pawnbroker who she believed would be interested in purchasing the weapon. Instead, she contacted Robert Landerville, a detective for the Sheriff's Office who pretended to be a pawnbroker. J.A. 11, 16.

Landerville traveled to where Petitioner, co-defendant, and the confidential informant were located. J.A. 14-15, T. 463. Petitioner discussed the barter arrangement with Landerville and an agreed upon trade of two (2) ounces of cocaine for the machinegun and silencer was arranged. J.A. 16. At trial, Landerville could only recall that Petitioner discussed trading the weapon for the cocaine. T. 229. The co-defendant, who had entered a plea agreement, testified when called by the government that Petitioner had also told Landerville that Petitioner was also interested in trading the gun for money. T. 463-64. A statement of the Petitioner was introduced into evidence in which he stated he was trying to trade the gun for money to buy food. T. 305.

Landerville left the motel ostensibly to obtain the cocaine for the trade. J.A. 17, 19. However, upon leaving he proceeded to contact other law enforcement officers who were involved in the matter including surveillance officers at the scene.

During this time period, Petitioner left the motel. When he left the motel room, he carried with him the black gun case that appeared to be the same one that had contained the machinegun displayed to Landerville. T. 237, 466. In the motel room, Petitioner had presented a

black gun case that contained the machinegun and a silencer to Landerville. J.A. 16. At the motel room, Petitioner had also displayed to Landerville a pistol which he had retrieved from his rear waistband area. J.A. 17.

The black gun case was placed in his vehicle and Petitioner departed the area in the vehicle. T. 237. The surveillance officers began following Petitioner and eventually attempted to pull him over. T. 238. After a chase, Petitioner's vehicle was cornered. T. 245. Petitioner raised his hands by the windows in a surrender posture and the officers fired. T. 246. Petitioner received wounds in his ear lobe, fingers, and leg. T. 250, 277-78, 295-6. No weapon was ever pulled by Petitioner. In fact, the police officer who fired the bullets which wounded Petitioner acknowledged that he never saw Petitioner display any weapon. T. 323. The machinegun and silencer were found still unloaded in the black zippered case in the van. Although the case also contained ammunition clips with live rounds, there is no evidence that the weapon was ever loaded. The next morning deputies searched the vehicle that Petitioner was driving. T. 312-13. Ammunition and numerous other weapons were found concealed within the vehicle which required the panel of the rear door to be removed to gain access to those items. T. 214-220; 312-366.

Petitioner was indicted for and convicted of eight felonies: (I) conspiracy to possess with intent to distribute cocaine, in violation of Title 21, United States Code, § 846; (II) attempted possession with intent to distribute cocaine, in violation of Title 21, United States Code § 841(a)(1) and Title 18, United States Code § 2; (III)

knowingly *using* an automatic firearm and silencer during and in relation to a drug trafficking crime[1], in violation of Title 18, United States Code § 924(c)(1); (IV) possession of firearms and ammunition as a convicted felon in interstate commerce, in violation of Title 18, United States Code §§ 922(g)(1) and 924(a)(2); (V) possession of unregistered automatic firearms, in violation of Title 26, United States Code §§ 5861(d) and 5871; (VI) possession of silencers without serial numbers, in violation of Title 26, United States Code, § 5842; (VII) interstate transportation of a stolen motor vehicle, in violation of Title 18, United States Code §§ 2312 and 2; and (VIII) possession of firearms as a fugitive from justice in violation of Title 18, United States Code §§ 922 (g)(2) and 924 (a)(2). J.A. 27-28.

The judgment was affirmed by the United States Court of Appeals for the Eleventh Circuit, after oral argument. J.A. 33-38. The Supreme Court of the United States granted certiorari and leave for Petitioner to proceed *in forma pauperis* on October 5, 1992. J.A. 39.

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[1] Although 18 U.S.C. § 924(c)(1) also prohibits the "carry[ing]" a firearm, the indictment in the instant case only charged the petitioner with the "use" of the automatic firearm and silencer. Moreover, even though the petitioner was charged with illegal possession of other firearms that were later found, he was only charged with a violation of 18 U.S.C. § 924(c)(1) regarding the automatic firearm and the silencer he displayed to the undercover detective during the barter negotiations.

SUMMARY OF ARGUMENT

Petitioner's act of offering the firearm in trade for a quantity of cocaine constituted an act of bartering and did not constitute "use" of a firearm during and in relation to a federal drug trafficking felony.

While the legislative history of the statute is sparse, it clearly supports the position that something more than possession of the firearm must exist in order to constitute use. The legislators expressed a concern that individuals simply in possession of the firearms during the crime should not be convicted and noted that actual use was the proscribed conduct.

ARGUMENT

The question here deals basically with the scope of Title 18 U.S.C. Section 924(c)(1), a statute duly created by Congress. The statute prohibits the use or carrying of a firearm during and in relation to a federal drug trafficking felony or a crime of violence. The Petitioner was indicted for the "use" of a firearm, and *not* for carrying the firearm, during and in relation to a drug trafficking crime. J.A. 4-5. Accordingly, the argument will focus on the question of "use" and not of carrying.

Petitioner's involvement with the firearm is that he offered it in trade as an item of barter. J.A. 16. There is no evidence in the record that he ever used the firearm as an offensive weapon.

Decisions of the several courts of appeals have over the course of the years expanded the meaning of "use" in

regard to this statute. "The word has been losing its conventional active connotation for some time, as courts have held that narcotics offenders can 'use' guns simply by possessing them in the vicinity of drugs." *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 111 S.Ct. 365 (1990). The problem in the wording of the instant statute is that the lower courts have made the word "use" virtually all inclusive whenever a new or different situation arises.[2]

In fact, one court, *United States v. Torres-Medina*, 935 F.2d 1047 (9th Cir. 1991), stated that the word "use" does not mean literal "use." The court held that "section 924(c)(1) does not require literal "use" of the firearm. In other words, that court held the definition of "use" is *not* based on the actual word in its ordinary meaning. *But, cf. United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2d Cir. 1988) ("carry" has only its literal meaning). There is ambiguity with regard to the meaning of the statute.[3]

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[2] E.g., *United States v. York*, 830 F.2d 885 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988) (use found even with inoperable gun that did not possess a firing pin and had an improperly aligned barrel); *United States v. Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (use found when firearm was never brandished or discharged; *United States v. Coburn*, 876 F.2d 372 (5th Cir. 1989) (use found where no ammunition existed for shotgun and shotgun was never brandished). *See also United States v. Smith*, 957 F.2d 835 (11th Cir. 1992), J.A. 33, and cases cited therein.

[3] *Compare United States v. Torres-Rodriguez*, 935 F.2d 1375, 1385 (9th Cir. 1991) (mere possession can constitute use under § 924(c)) *with United States v. Bruce*, 939 F.2d 1053 (D.C.Cir. 1991) (government cannot convert 924(c) into a simple possession statute; when Congress wishes to criminalize the possession of a firearm it knows how to do so).

Moreover, in *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *rehearing denied*, 895 F.2d 1281 (1990) (*en banc*) (Kozinski, J., dissenting from denial of rehearing en banc), a case relied upon by Petitioner in the court below, the court held that the trading of a firearm for drugs did not constitute "use" under the meaning of the statute. Accordingly, there is no plain meaning of the word "use" and there must be an interpretation and an understanding of the words used by Congress.

"If the language of the statute is unambiguous, it is conclusive unless there is a 'clearly expressed legislative intention to the contrary . . . .'" *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

> Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.). *See also United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-544 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'") (citations omitted).

Public Citizen v. United States Department of Justice, 491 U.S. 440, 455 (1989).

Consequently, it is important to analyze the original legislative history of § 924(c) which will show that it was not Congress' intention to encompass anything beyond the literal meaning of the word "use" in section 924(c), but to only proscribe the actual use of a firearm as an offensive weapon. A similar analysis was performed in *Simpson v. United States*, 435 U.S. 6 (1978) and later in *Busic v. United States*, 446 U.S. 398 (1980). *Simpson* noted that the legislative history with regard to § 924(c) is "sparse." *Id.*, 435 U.S. at 15.

Simpson determined that § 924(c), "which was enacted as a part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff. 114 Cong. Rec. 22231 (1968)."[4] *Simpson*, 435 U.S. at 14. Representative Poff's amendment was, in reality, an amendment to Representative Casey's proposal which provided:

> (c) That whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping [sic], or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned –
>
> (1) in the case of his first offense, for not less than ten years;
>
> (2) in the case of his second or more offense, for not less than twenty-five years.

114 Cong. Rec. 22229 (1968).

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[4] "Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports." *Simpson*, 435 U.S. at 13, n. 7.

In his statement immediately following his introduction of the amendment, Representative Casey observed:

> In the general debate the other day it was noted that having the words in there, "or carries," poses a problem. One of my colleagues will propose to offer an amendment to my amendment which be to strike those words "or carries," so that it will apply only to those who *actually use* a gun in the commission of the offenses enumerated.

114 Cong. Rec. 22229-30 (1968). (Emphasis added.)[5] Mr. Casey's amendment proscribed the literal or actual "use" of a firearm as an offensive weapon.

The Poff amendment retained the language "uses or carries," but eliminated the requirement of an interstate or foreign commerce nexus, applied the statute to "any felony which may be prosecuted in a court of the United States," and included the word "unlawfully" to modify "carries" to eliminate a "Congressional concern that without it policemen and persons licensed to carry firearms who committed federal felonies would be subjected to additional penalties even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an *offensive* weapon for a specific criminal act." S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 n. 10 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3492 n. 10. (Emphasis supplied.) Mr. Poff's amendment also included a minimum

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[5] The Congressional Record noted that a quorum was present at the time of Mr. Casey's remarks. 114 Cong. Rec. 22230 (1968).

mandatory sentencing provision. 114 Cong. Rec. 22231 (1968).

In his statement immediately following his introduction of the amendment, Representative Poff observed:

> Mr. Chairman, my amendment is a substitute for the Casey amendment, but it is *not in derogation of the Casey amendment*. Rather, *it retains its central thrust* and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment.
>
> * * *
>
> The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail.

114 Cong. Rec. 22231 (1968). (Emphasis supplied.)

Mr. Casey's and Mr. Poff's comments as the sponsors of the amendment are also clearly probative of a legislative judgment that the purpose of § 924(c) was to prohibit the *actual* use of a firearm and did not outlaw possessing a firearm at the time of the commission of a federal felony. *See Simpson, supra,* 435 U.S. at 13. "Although these remarks are of course not dispositive of the issue of § 924(c)'s reach they are certainly entitled to weight, coming as they do from the provision's sponsor[s]." *Simpson, supra,* 435 U.S. at 14.

> Subsequent events in the Senate and the Conference Committee pertaining to the statute buttress [the] conclusion that Congress' view of the proper scope of § 924(c) was that expressed

> by Representative Poff [and Representative Casey]. Shortly after the House adopted the Poff amendment, the Senate passed an amendment to the Gun Control Act, introduced by Senator Dominick, that also provided for increased punishment whenever a firearm was used to commit a federal offense. 114 Cong. Rec. 27142 (1968).

Simpson, supra, 435 U.S. at 14.

The Senate Amendment, the Dominick Amendment, however, differed in one crucial way. Instead of proscribing when an individual "uses or carries" a firearm, the Senate Amendment, unlike the House Amendment, made it illegal to be "armed" with a firearm. 114 Cong. Rec. 27142 (1968). The Senate Amendment's version did not provide for the two distinct methods of use and carry to commit the criminal act; it proscribed, instead, one wide ranging method of committing the criminal act. "A Conference Committee, with minor changes [not relevant here], subsequently adopted the Poff version of § 924(c) in preference to the Dominick amendment. H.R.Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31-32 (1968), U.S. Code Cong. & Admin. News 1968, pp. 4410, 4426." *Simpson, supra,* 435 U.S. at 14. (Footnote omitted.)

In 1984, Congress passed the Comprehensive Crime Control Act of 1984. This act amended § 924(c) by eliminating the word "unlawfully" which proceeded the word "carrying" and also narrowed the breadth of the statute to apply to crimes of violence as opposed to all federal felonies.[6] The term "during" was also changed to "during

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[6] In 1986, the present statute was passed which added the applicability of the statute to include federal drug trafficking

and in relation to."[7] The accompanying Senate Report. S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3492, provided some examples of use:

> For example, a person convicted of armed bank robbery in violation of section 2113 (a) and (d) and of using a gun in its commission (for example by pointing it at a teller or otherwise displaying it whether or not it is fired) . . .

Both examples are instances of actual use. The Senate Report further explained that while not constituting "use," a "defendant [who] had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm." *Id.* at n. 10. By the distinction of proscribing two different methods to commit a violation of § 924(c), one by "use" and the other by "carrying," Congress intended to distinguish between the two separate methods.[8] This also further distinguishes the Dominick Amendment which was not

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felonies as well as crimes of violence. P.L. 98-473, 98 Stat. 1837 (1984).

[7] The accompanying Senate Report, S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 n. 10 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3492 n. 10, explained the meaning of the phrase "in relation to": "Moreover, the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight."

[8] See also *Busic v. United States, supra,* 446 U.S. 398, wherein one defendant was convicted of using a firearm in violation of 18 U.S.C. § 924(c) and the other of carrying a firearm in the commission of a felony, under section 924(c).

adopted and which proscribed a singular method of violating the statute, by being armed. As noted, Petitioner was only charged with "use" of a firearm and not with carrying the firearm.

To construe the statute to prohibit the method by which the firearm was involved in this case, that is, as an item of barter, would violate the established rule of construction that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978)." *Simpson, supra*, 435 U.S. at 14-15. "The legislative history of § 924(c) is of course sparse, yet what there is particularly Representative[s Casey's and] Poff's statement[s] and the Committee rejection of the Dominick amendment – points in the direction of a congressional view that the section was intended to" apply only to the actual use of a firearm as an offensive weapon. *See Simpson, supra*, 435 U.S. at 15. Because there exists "something 'more than a guess' in this case, that something – Representative[s Casey's and] Poff's commentar[ies] and the Conference Committee's rejection of the Dominick amendment – is incremental knowledge that redounds to" the position that the intent of Congress was to outlaw the *actual use* of a firearm as an *offensive weapon*. *See Simpson*, 435 U.S. at 15. In the instant case, the firearm was never used as an offensive weapon. Indeed, "[e]ven where the relevant legislative history was not nearly so favorable to the defendant as this, this Court has steadfastly insisted that 'doubt will be resolved

against turning a single transaction into multiple offenses.' " *Simpson*, 435 U.S. at 15.

Another indication that Congress did not contemplate the trading of firearms for drugs as the "use" of a weapon under § 924(c) is presented in the following example. An individual (hereinafter referred to as "trader") in the midst of a drug transaction decides to offer a firearm in exchange for the drugs. The trader is not presently in possession of the firearm because he had pawned it several weeks earlier before he had ever contemplated being involved in any drug transaction. The transaction is consummated and the trader receives the drugs immediately in return for turning over the pawn ticket. In this example, as in the instant case, the firearm is never actually used as an offensive weapon and the act of trading the firearm for drugs does not fall within the ambit of the statute. To include the above example as a proscribed method of violating the statute and to not accept the literal meaning of the word "use" as the only valid definition in § 924(c) would create an absurd result clearly not within the intent of Congress.

> As [this Court] said in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of its circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Public Citizen v. United States Department of Justice, 491 U.S. 440, 454 (1989).

Further, it is clear that Congress did not intend that possession alone could constitute "use" under 924(c). If Congress intended to make mere possession illegal during and in relation to a drug trafficking felony, it knows how to do so. *See, e.g.*, 18 U.S.C. § 922(g), 18 U.S.C. App. § 1202(a)(1), 26 U.S.C. § 5861(d), *see also* United States Sentencing Commission, *Guidelines Manual* § 2D1.1(b)(1) (Nov. 1990) (enhancement for possession of a firearm). *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir. 1991).

The interpretation of the meaning of the word "use" in § 924(c) has become expansive as noted by the decision in *United States v. Long, supra*, 905 F.2d 1572, and the cases cited therein. "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin v. United States*, 270 U.S. 245, 250, 251 (1926).

" '[I]n expounding a statute, [this Court is] not . . . guided by a single sentence or a member of a sentence, but look[s] to the provisions of the whole law and to its object and policy'." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). The object, policy, and legislative history of this statute was to outlaw the actual use of firearms as offensive weapons during and in relation to a drug trafficking felony. Petitioner never actually used the firearm as an offensive weapon; he offered it as an item of barter in trade for drugs.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeals upholding the Petitioner's conviction under Title 18, United States Code Section 924(c)(1) must be reversed for the reason that the statute does not apply to the conduct of the Petitioner in offering a firearm for barter as opposed to actually using the firearm as an offensive weapon.

Respectfully submitted,

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No. 91-8674

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN ANGUS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 924(c)(1), which prohibits the "use[]" of a firearm "during and in relation to any * * * drug trafficking crime," proscribes the exchange of a firearm for narcotics.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 33-38) is reported at 957 F.2d 835.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1992. The petition for a writ of certiorari was filed on June 19, 1992, and was granted on October 5, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 924 (Supp. II 1990) provides in pertinent part:

* * * * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, * * * and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 846; using a machinegun fitted with a silencer during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1); possession of unregistered automatic firearms, in violation of 26 U.S.C. 5861(d); possession of unregistered silencers, in violation of 26 U.S.C. 5861(i); interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312; and possession of firearms by a fugitive from justice, in violation of 18 U.S.C. 922(g)(2).[1] He was sentenced to 393 months' imprisonment, to be followed by a three-year period of supervised release. J.A. 32. The court of appeals affirmed.

1. The evidence at trial showed that during December 1989 petitioner, accompanied by co-defendant Charles Roy Davis, traveled from Tennessee to Florida for the purpose of obtaining a quantity of cocaine for resale. Tr. 452-460. After arriving in Florida, petitioner met with an acquaintance named Deborah Hoag who, unbeknownst to him, was a police informant. Tr. 200-201, 460-461. Petitioner gave Hoag a quantity of money for the purchase of cocaine. Following the purchase, the trio went to the motel room

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[1] Petitioner's co-defendant Charles Roy Davis pleaded guilty to five counts of the indictment and testified on behalf of the government at petitioner's trial.

where Hoag was staying. There, they were joined by a drug dealer who gave Hoag another rock of cocaine. The dealer and petitioner then discussed a MAC-10 machinegun equipped with a silencer that petitioner owned. Petitioner promised to discuss selling the gun to the drug dealer if petitioner's arrangement to sell it to another potential buyer fell through. Tr. 461-463.

Shortly thereafter, Hoag telephoned the Broward County Sheriff's Office and informed the police of the pending sale of the machinegun. J.A. 11-12; Tr. 201. As a result, an undercover officer, posing as a pawnshop dealer, visited Hoag's motel room where he introduced himself to petitioner. Petitioner informed the officer that he had an automatic MAC-10 machinegun with a silencer for sale. After displaying what he represented to be a "fully automatic MAC-10" and accompanying silencer for the officer's inspection, petitioner stated that he wanted "two ounces of good cocaine" in exchange for it. J.A. 13-17. Petitioner then pulled a nine millimeter semiautomatic pistol from his waistband, placed it on a table, and told the officer that he trusted him. Petitioner also advised the officer that he had evaded efforts by law enforcement officers in Tennessee to arrest him on unrelated charges. J.A. 17-18.

The undercover officer then left the motel room for the ostensible purpose of obtaining cocaine; instead, he returned to his office to report his observations and arrange for petitioner's arrest. Tr. 204, 209-214. After the undercover officer's departure, other officers who were keeping the motel under surveillance saw petitioner leave the building, place a gun bag in his vehicle, and drive away. Tr. 237-238.

When the police attempted to stop petitioner's vehicle in order to arrest him, he led them on a high-speed chase at speeds of up to 100 miles per hour. Eventually, the police cornered petitioner in a cul-de-sac. Petitioner rammed his vehicle into a police car and injured its driver, who fired at petitioner and wounded him. Petitioner was then arrested. Tr. 238-246.

At the time of the arrest, petitioner was carrying in his waistband the loaded handgun that he had previously shown to the undercover officer at the motel. Tr. 205-206, 246, 257, 263-265. A subsequent search of petitioner's vehicle revealed the presence of the MAC-10 machinegun, together with a silencer, ammunition, and a "fast feed" mechanism for the weapon. The search also revealed a MAC-11 machinegun with a loaded magazine, a loaded .45 caliber pistol, a .22 caliber pistol with a scope, and a homemade silencer. Tr. 204-205, 313-315, 319-324, 328-329. The MAC-10 had been modified to fire in a fully automatic mode and was capable of discharging approximately 950 rounds per minute. Tr. 537-540; J.A. 36 n.6.

2. Petitioner was subsequently charged with, *inter alia*, one count of "us[ing] a firearm, that is a MAC-10 machinegun * * * fitted with a silencer, during and in relation to * * * drug trafficking crimes," in violation of 18 U.S.C. 924(c). J.A. 4-5.[2] Section 924(c) imposes a mandatory 30-year sentence for the use of a machinegun or a silencer in relation to a drug trafficking offense. 18 U.S.C. 924(c)(1).

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[2] The drug trafficking crimes specified in the indictment were the attempted possession of cocaine with intent to distribute it and the conspiracy to commit that offense. J.A. 3-4.

With respect to the Section 924(c) count, the district court instructed the jury that it could convict only if it found that petitioner "knowingly used" the machinegun "while committing * * * [a] drug trafficking crime." J.A. 21. The court further instructed the jury as follows:

> Section 924(c) does not require that a firearm be shown, displayed, brandished or fired.
>
> You may find a defendant used a firearm within the meaning of Section 924(c), that is, during and in relation to a drug trafficking felony if you find that the firearm named in the count related to the defendant was an integral part of a drug trafficking crime as I have defined it.
>
> To be an integral part of such a crime, a firearm must be, first, present, second, available to the defendant in question, and third, in some way connected to the underlying drug trafficking crime.

J.A. 21-22. Petitioner did not object to the instruction as given.

3. On appeal, petitioner argued that Section 924(c)(1) applies only to situations in which the firearm is used as a weapon during a narcotics transaction and not to drug transactions in which the firearm is employed as a medium of exchange for narcotics. Petitioner relied on the Ninth Circuit's decision to that effect in *United States* v. *Phelps*, 877 F.2d 28 (1989).

The court of appeals found *Phelps* unpersuasive, explaining that "the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect. The plain language of the statute supplies no such requirement." J.A. 34-35 (footnote omitted). Instead, the court of appeals held that the

language of Section 924(c)(1) unambiguously encompasses the exchange of firearms for drugs. The court accordingly found no need to consider the legislative history of the statute. The court noted, however, that it "would reach the same conclusion if forced to confront the legislative history." J.A. 35 n.5.

The court of appeals further held that Section 924(c)(1) does not require that the firearm be " 'fired, brandished, or even displayed during the drug trafficking offense' " in order for it to be "use[d]" during and in relation to a drug trafficking offense. J.A. 36. Instead, the court explained, "all that is needed [to establish a violation of Section 924(c)(1)] is 'an intent to use the weapon to facilitate *in any manner* the commission of the [drug trafficking] offense.' " J.A. 37 (quoting *United States* v. *Phelps*, 895 F.2d 1281, 1286 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc)). Accordingly, the court concluded "that trading guns for drugs constitutes use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)." J.A. 37-38.

SUMMARY OF ARGUMENT

A. Section 924(c)(1) applies to anyone who "during and in relation to any * * * drug trafficking crime * * * uses * * * a firearm." 18 U.S.C. 924(c)(1). The terms "uses" and "in relation to," when construed according to their ordinary meaning, are unquestionably broad enough to encompass the employment of a firearm as a medium of exchange for illegal drugs. If anything, the use of a firearm to purchase drugs is more clearly a "use[]" "in rela-

tion to" a drug trafficking crime than is the use of a firearm as a weapon, because in the former case the firearm is an integral part of the crime itself.

Petitioner contends that the term "uses," as set forth in Section 924(c)(1), has been rendered ambiguous by conflicting lower court decisions, and that recourse to the statute's legislative history is therefore appropriate. Petitioner errs, however, in assuming that a division of judicial authority can render ambiguous the language of a statute that is plain on its face. Section 924(c)(1) unambiguously proscribes petitioner's conduct, and reference to the statute's legislative history is therefore unnecessary.

Petitioner also errs in suggesting that the lower courts have construed the term "uses" in an inconsistent manner. With the lone exception of the Ninth Circuit in *United States* v. *Phelps*, 877 F.2d 28, 29-31 (1989), the courts of appeals have repeatedly held that the term "uses" in Section 924(c)(1) does not require that the firearm be used as a weapon. To the contrary, any use of a firearm to facilitate a predicate offense, even if the firearm is unavailable to the defendant or could not be used as a weapon, constitutes a "use[]" of the firearm for purposes of Section 924(c)(1).

B. Even if recourse to the statute's legislative history were appropriate in this case, the result would be the same. Section 924(c)(1) had its genesis in a floor amendment, sponsored by Representative Poff, to the Gun Control Act of 1968. Nothing in the language or legislative history of that amendment supports petitioner's claim that Congress intended the statute to apply only to the use of a firearm as a weapon. To the contrary, Representative Poff stated that the purpose of his amendment was "to persuade

the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968). To the extent any of the 1968 enactment history is relevant in construing the meaning of Section 924(c)(1), it is the statement of Representative Poff, the provision's sponsor, that should be given the greatest weight.

Congress amended Section 924(c)(1) in 1984, but again there is nothing in the legislative history of that amendment to support petitioner's cramped reading of the statute. Petitioner relies on isolated statements taken from the Senate Judiciary Committee's report on the 1984 amendment, but those statements in fact indicate that Congress understood the statute to apply in cases, like this one, in which a firearm in fact plays a role in the predicate offense.

Finally, Congress again amended Section 924(c)(1) in 1986, by adding "drug trafficking crime[s]" as a new category of predicate offenses under the statute. The legislative history of the 1986 amendment indicates that Congress acted in order to "[p]rovide an important new weapon against narcotics traffickers" and to "protect[] * * * law enforcement officers from the proliferation of machine guns and high-powered 'assault-type' weapons that are increasingly being used by criminals." H.R. Rep. No. 495, 95th Cong., 2d Sess. 2, 7 (1986). Petitioner's conduct, which was intended to result in the transfer of a dangerous weapon to a drug dealer, falls squarely within the type of behavior that Congress sought to deter when it added drug trafficking crimes to the list of predicate offenses covered by Section 924(c)(1).

C. The rule of lenity is not applicable in this case. That rule comes into play only in cases involving a

" 'grievous ambiguity or uncertainty in the language and structure of the Act' " that cannot be resolved by recourse to all the normal aids to statutory construction. *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). In this case, the plain language of the statute unambiguously proscribes petitioner's conduct, and thus there is no room for lenity.

ARGUMENT

THE EXCHANGE OF A FIREARM FOR A CONTROLLED SUBSTANCE CONSTITUTES THE USE OF THE FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME

The court of appeals correctly held that the plain language of 18 U.S.C. 924(c)(1) proscribes the exchange of firearms for controlled substances. J.A. 33-38; accord *United States* v. *Harris*, 959 F.2d 246, 261-262 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1992). The only court to reach a contrary conclusion, the Ninth Circuit, did so only by rejecting the unambiguous language of Section 924(c)(1) in favor of a strained reading of the statute's legislative history. See *United States* v. *Phelps*, 877 F.2d 28, 29-31 (1989). For the reasons set forth below, the statutory construction urged by petitioner and accepted by the *Phelps* court is contrary to both the language and the legislative history of the statute, and should be rejected.

A. The Exchange Of Firearms For Drugs Is Covered By The Express Language Of 18 U.S.C. 924(c)(1)

1. As this Court has explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). See, *e.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 602 (1991); *Pennsylvania Public Welfare Dep't* v. *Davenport*, 495 U.S. 552, 557-558 (1990); *Mallard* v. *United States District Court*, 490 U.S. 296, 300 (1989). Despite petitioner's argument to the contrary, "[i]n this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. at 241, quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). See also *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992).

Section 924(c)(1) imposes an enhanced sentence on anyone who "during and in relation to any * * * drug trafficking crime * * * uses * * * a firearm." 18 U.S.C. 924(c)(1). The statute contains no definition of the terms "in relation to" or "uses," and thus those terms must be given their "ordinary * * * common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); see also *Chapman* v. *United States*, 111 S. Ct. 1919, 1925 (1991).

The dictionary definition of "use" is "to put into action or service," to "have recourse to or enjoyment of," to "employ," "to carry out a purpose or action by means of," to "make instrumental to an end or process," or to "utilize." *Webster's Third New International Dictionary* 2523-2524 (1986). Thus, the "ordinary * * * common meaning" of that term as set forth in Section 924(c)(1) broadly embraces any conduct by a defendant with a firearm calculated " 'to put [it] into action or service; have recourse to i[t] * * * make [it] instrumental to an end or process; apply [it] to advantage * * * utilize [it] * * * [or] employ [it].' " *United States* v. *Cordero*, 668 F.2d

32, 43 n.16 (1st Cir. 1981).[3] A defendant who "employ[s]" a gun in order "to carry out [the] purpose or action" of purchasing drugs by "utiliz[ing]" it as a medium of exchange has unquestionably "use[d]" the gun within the common meaning of that term.

The phrase "in relation to" means with "reference" to or with "respect" to. *Webster's Third New International Dictionary* 1916 (1986). As the lower courts have uniformly held, "[t]he phrase 'in relation to' is broad." *United States* v. *Phelps*, 877 F.2d 28, 30 (9th Cir. 1989).[4] Nothing about that phrase suggests that it applies only to the use of a firearm as a weapon; to the contrary, the statute expressly contemplates application to anyone who "uses" a firearm "in relation to" a predicate offense, without in any way limiting the types of uses covered.

If anything, the use of a firearm as a medium of exchange is *more* clearly "in relation to" the predicate offense of possessing controlled substances with intent

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[3] See also *Astor* v. *Merritt*, 111 U.S. 202, 213 (1884), where the Court defined the term "use" as meaning "to employ, [or] to derive service from."

[4] See, *e.g.*, *United States* v. *Harris*, 959 F.2d at 261 ("in relation to" limitation "requires no more than that the guns facilitate the predicate offense in some way"); *United States* v. *Torres-Medina*, 935 F.2d 1047, 1048 (9th Cir. 1991) ("in relation to" requirement is satisfied if the firearm "played some role in[] the underlying crime"); see also *United States* v. *Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990) (firearms are "used during and in relation to drug trafficking" where they are "used to further the drug venture"); cf. *District of Columbia* v. *Greater Washington Bd. of Trade*, No. 91-1326 (Dec. 14, 1992), slip op. 4 (noting the " 'deliberately expansive' " nature of the phrase "relate to" as used in the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*).

to distribute them than is the use of a firearm as a weapon. "Far more than the ordinary case where a gun is carried by one of the parties merely for protection, the gun here was an integral part of the transaction—it was the sweetener that made the deal work." *United States* v. *Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc). Where the firearm is the agreed-upon payment for drugs, and the predicate offense is the possession of those drugs with intent to distribute them, the firearm's use is unquestionably "in relation to" the drug offense under the "ordinary * * * common meaning" of that phrase.

2. Petitioner contends (Pet. Br. 6-9) that the term "uses" as set forth in Section 924(c)(1) has been rendered ambiguous by decisions of the lower courts, and that recourse to the statute's legislative history is therefore necessary in order to resolve that judicially created ambiguity. Petitioner cites no authority, however, for the proposition that the existence of inconsistent lower-court decisions compels recourse to a statute's legislative history even when the language of the statute is clear on its face. This Court's cases foreclose that interpretive approach. See *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2199-2200 (1991) (finding recourse to legislative history unnecessary because statutory language was clear, even though courts of appeals were divided over the question); cf. *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990) (statute not rendered "ambiguous" for purposes of the rule of lenity merely because of a division of judicial authority). As this Court has repeatedly held, where the language of a statute is unambiguous on its face and

does not lead to an absurd result, a court should not rely on the statute's legislative history to determine its meaning. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989); *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 199 (1977).

In any event, petitioner errs in suggesting (Pet. Br. 6-7) that the cases on which he relies reveal "ambiguity with regard to the meaning of the statute" as the result of judicial "expan[sion]" of the word "use." With the lone exception of the Ninth Circuit's decision in *Phelps*, the decisions in this area demonstrate that the common understanding of the term "uses" is broad enough to embrace any employment of a firearm to facilitate a drug trafficking offense.

In construing Section 924(c)(1), the courts of appeals have repeatedly indicated that the term "uses" does not require that the firearm be employed as a weapon.[5] As then-Judge Kennedy explained in *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985), cert. denied, 484 U.S. 867 (1987):

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[5] See, *e.g.*, *United States* v. *Hager*, 969 F.2d 883, 889 (10th Cir. 1992) ("the cases are unanimous in holding that a defendant can 'use' a firearm without firing, brandishing or displaying it"); *United States* v. *Featherson*, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 112 S. Ct. 1698, 112 S. Ct. 1771, 113 S. Ct. 361 (1992); *United States* v. *Torres-Medina*, 935 F.2d 1047, 1049 (9th Cir. 1991); *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989); *United States* v. *Meggett*, 875 F.2d 24, 29 (2d Cir.), cert. denied, 493 U.S. 858 (1989); see also *United States* v. *Plummer*, 964 F.2d 1251, 1255 (1st Cir. 1992); *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir.) (Thomas, J.) ("a defendant can 'use' a firearm without actively employing it"), cert. denied, 111 S. Ct. 365 (1990).

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute.

For example, the courts of appeals have concluded that even if a firearm is concealed or out of the defendant's reach, it has been "use[d]" to facilitate a drug trafficking offense if its apparent purpose is to embolden the dealer or protect the narcotics or the proceeds of the enterprise.[6] The courts have also

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[6] See, *e.g.*, *United States* v. *Castro-Lara*, 970 F.2d 976 (1st Cir. 1992) (empty pistol in briefcase within locked trunk "use[d]" during drug trafficking crime as it may have lent courage during transaction); *United States* v. *Hager*, 969 F.2d at 889 (pistol kept in boot in room where drug transactions occurred in order to protect the defendant and his cocaine); *United States* v. *Abreu*, 952 F.2d 1458, 1466 (1st Cir. 1992) (even though never fired, firearm kept to protect drug operation is used within the meaning of the statute); *United States* v. *Featherson*, 949 F.2d at 776 (gun concealed under mattress could have been used to protect narcotics); *United States* v. *Hadfield*, 918 F.2d 987, 998 (1st Cir. 1990) (although firearm was not at the site of the drug transaction, its apparent purpose was to protect the drug transaction), cert. denied, 111 S. Ct. 2062 (1991); *United States* v. *Poole*, 878 F.2d at 1394 (concealed but accessible firearm was "used to protect [drug] house members and the cocaine"); *United States* v. *Meggett*, 875 F.2d at 29 ("[p]ossession of a gun, even if it is concealed, constitutes 'use' if such possession is an integral part of the predicate offense and facilitates the

held that a firearm may be "use[d]" in the commission of a drug trafficking offense even when it is unloaded or inoperable and therefore could not be used as a weapon if the defendant desired or intended to do so.[7] Thus, contrary to petitioner's contention, the lower courts have held that the term "uses" must be construed broadly in keeping with its ordinary meaning.[8]

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commission of that offense"); *United States* v. *LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985) ("Section 924(c)(1) reaches the possession of a firearm which in any manner facilitates the execution of a felony.").

[7] See, *e.g.*, *United States* v. *Hill*, 967 F.2d 902, 905-907 (3d Cir. 1992) (unloaded, disassembled, concealed rifle); *United States* v. *Moore*, 919 F.2d 1471, 1476 (10th Cir. 1990) (defective machine gun), cert. denied, 111 S. Ct. 2812 (1991); *United States* v. *Coburn*, 876 F.2d 372, 375 (5th Cir. 1989) ("[t]he fact that a firearm is 'unloaded' or 'inoperable,' does not insulate the defendant from the reach of section 924(c)"); *United States* v. *York*, 830 F.2d 885, 891 (8th Cir. 1987) (lack of firing pin and defective cylinder), cert. denied, 484 U.S. 1074 (1988).

[8] To bolster his argument that the word "uses" is ambiguous, petitioner points to *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir.) (Thomas, J.), cert. denied, 111 S. Ct. 365 (1990), which rejected the proposition that a firearm is used merely by reason of its presence in the vicinity of a drug trafficking offense. Pet. Br. 7. *Long* did not, however, hold that the term "uses" is ambiguous, or suggest that it should be confined to instances in which a firearm is actually employed as a weapon. To the contrary, the *Long* court acknowledged that "there are many ways in which a defendant can 'use' a firearm in relation to a drug trafficking crime," and stated that "a defendant can 'use' a firearm without actively employing it." *Id.* at 1576, 1577. The court explained that, although "the word 'use' is expansive," it requires the government to demonstrate some nexus "between a particular drug offender and the firearm that he allegedly 'used.'" *Id.* at 1577. Thus, *Long* fully supports the government's position in this case that the term "uses," while sufficiently broad to embrace a multitude of situations, is not rendered ambiguous by virtue of its wide scope.

A firearm employed as a medium of exchange for drugs is just as surely "use[d]" to "facilitate the predicate offense" (*Harris*, 959 F.2d at 261) as were the concealed, unloaded, or inoperable firearms found to have been embraced by the statute in other cases. Indeed, in cases such as this one, "the trade not only facilitates, but also becomes, an illegal drug transaction." J.A. 37. Accord *United States* v. *Harris*, 959 F.2d at 261-262. Thus, by employing a machinegun as the inducement for the exchange of cocaine, petitioner "use[d]" the gun during and in relation to a drug trafficking crime and thereby violated the plain terms of Section 924(c).

B. The Legislative History Of Section 924(c) Provides No Support For A Construction Of The Statute That Would Limit Its Application To Instances In Which A Firearm Is Used As A Weapon

Petitioner does not seriously dispute that the ordinary meaning of the word "uses" encompasses instances in which a firearm is exchanged for drugs. Instead, relying upon selected portions of the scant legislative history of Section 924(c), petitioner asserts that, despite the broad language Congress employed in drafting the statute, Section 924(c)(1) was intended to proscribe only "the actual use of a firearm as an offensive weapon." Pet. Br. 9.

As noted above, there is no reason to consider the legislative history of Section 924(c) at all. The statutory language is clear on its face, and it plainly

encompasses petitioner's conduct. While it may be appropriate in a narrow class of cases to examine the legislative history of a facially unambiguous statute in order to avoid an "absurd" result (see, *e.g.*, *United States* v. *Brown*, 333 U.S. 18, 27 (1948); see also *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in the judgment)), there is no need to do so here. There is nothing "absurd" about a statute that renders individuals who deal in both firearms and drugs susceptible to longer sentences than those who deal in drugs alone. Accordingly, the statute must be construed according to the ordinary meaning of its language.

Even if it were necessary to consult the legislative history to answer the question of statutory construction presented in this case, the result would be the same. "When properly read, the legislative record here overwhelmingly supports [petitioner's] conviction." *United States* v. *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting from denial of rehearing en banc).

1. As originally enacted in 1968, Section 924(c) imposed mandatory sentences upon anyone who "(1) uses a firearm to commit any felony which may be prosecuted in any court of the United States" or "(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States."[9] The statute had its

[9] The statute, Pub. L. No. 90-618, § 102, 82 Stat. 1224, provided as follows:

> (c) Whoever—
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> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

genesis as a floor amendment, sponsored by Representative Poff, to H.R. 17735, 90th Cong., 2d Sess. (1968), then known as the State Firearms Control Assistance Act of 1968. 114 Cong. Rec. 22,231 (1968); see *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978). The House of Representatives (see 114 Cong. Rec. 22,248 (1968)) and, subsequently, the conference committee (see H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 12, 31 (1968)) adopted the Poff amendment,[10] and it was enacted into law as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224.

Nothing in either the language of the Poff amendment or the legislative debate on the amendment supports petitioner's claim (Pet. Br. 9) that Congress intended Section 924(c)(1) to be limited to instances

[10] The conference committee revised the Poff amendment in ways unrelated to this case. In particular, the committee deleted a prohibition against concurrent sentences in the Poff amendment and permitted sentences of probation or suspended sentences for first violations of the statute. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The conference committee's version of the statute was accepted by both the House (114 Cong. Rec. 30,587 (1968)) and the Senate (*id.* at 30,183).

in which a firearm is employed as an offensive weapon. Representative Poff's description of the purpose of his amendment suggests instead that Congress understood the words of Section 924(c) to mean exactly what they say. Representative Poff explained that the effect of his amendment would be "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail." 114 Cong. Rec. 22,231 (1968). That statement suggests that the purpose of Section 924(c)(1) is served whenever it is applied to a person who commits a federal crime and who fails to "leave his gun at home," regardless of the precise manner in which he uses the firearm in the commission of the offense.

In arguing for a narrower reading of Section 924(c)(1), petitioner relies primarily on the remarks of Representative Casey, who had previously introduced an amendment similar to that offered later by Representative Poff. Pet. Br. 9-10. Representative Casey's amendment would have imposed mandatory penalties on anyone who "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide * * * uses or carries any firearm." 114 Cong. Rec. 22,229 (1968). After introducing his amendment, Representative Casey noted that the amendment's use of the phrase " 'or carries,' poses a problem. One of my colleagues will propose to offer an amendment to my amendment which will be to strike those words 'or carries,' so that it will apply only to those *who actually use a gun in the commission of the offenses enumerated.*" *Id.* at 22,229-22,230 (emphasis added).

According to petitioner, Representative Casey's statement indicates that Section 924(c)(1) was intended to proscribe only "the literal or actual 'use' of a firearm as an offensive weapon." Pet. Br. 10.[11] But Representative Casey did not say that the firearm had to be used as an offensive weapon; rather, he merely said that, if the anticipated amendment were adopted, the statute would proscribe only the actual use, not the mere carrying, of a firearm during commission of an enumerated offense. Even if Representative Casey's statement were relevant to the interpretation of Section 924(c)(1), therefore, it would not assist petitioner, because petitioner did "actually use a gun" in the commission of a drug offense.

In any event, Representative Casey's statement is of only limited value as an indication of Congress's intent regarding Section 924(c)(1). The Casey amendment was displaced by Representative Poff's amendment. 114 Cong. Rec. 22,231 (1968). Thus, it is the remarks of Representative Poff, not Representative Casey, that are of principal value as those of the sponsor of the legislation ultimately adopted,[12]

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[11] The Poff amendment did not, as Representative Casey had anticipated, "strike those words 'or carries' " from his amendment. 114 Cong. Rec. 22,230 (1968). Instead, the Poff amendment retained the "or carries" prong of the proposed statute, but limited liability under that prong to those individuals who carried a gun *unlawfully* during commission of a felony. *Id.* at 22,231. Thus, Representative Casey either misapprehended the nature of the Poff amendment or was not referring to that amendment at all when he made the statement cited by petitioner.

[12] Quoting a portion of this Court's decision in *Simpson*, petitioner erroneously implies, by including the name of Representative Casey in brackets, that Representative Casey

and "it is therefore reasonable to assume that [Representative Poff's remarks] represent the understanding of the Congressmen who voted for the proposal." *Busic* v. *United States*, 446 U.S. 398, 406 (1980) (footnote omitted); see also *Simpson*, 435 U.S. at 13 (referring to Representative Poff as "the provision's sponsor").[13] Accordingly, nothing about the 1968 enactment history of Section 924(c) provides any support for petitioner's construction of the statute.[14]

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was a sponsor of the amendment that became Section 924(c). Pet. Br. 11-12 (quoting *Simpson*, 435 U.S. at 14). Neither this Court's decision in *Simpson* nor the legislative history itself suggests that Representative Casey's remarks are entitled to the deference accorded those of a sponsor of legislation. See *Simpson*, 435 U.S. at 13-14.

[13] To be sure, as petitioner observes (Pet. Br. 11), Representative Poff did state that his amendment "is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment." 114 Cong. Rec. 22,231 (1968). That statement does not suggest, however, that Representative Poff was somehow adopting everything Representative Casey said about his own amendment.

[14] Petitioner seeks additional support for his position from the fact that a conference committee subsequently adopted the House version of Section 924(c) instead of a Senate formulation that had been proposed by Senator Dominick. See Pet. Br. 12-14. The Dominick amendment would have made it illegal to commit any offense "which is a crime of violence * * * [while] armed with any firearm." 114 Cong. Rec. 27,142 (1968). Petitioner maintains that the conference committee's rejection of the Dominick amendment "'points in the direction of a congressional view that the section was intended to' apply only to the actual use of a firearm as an offensive weapon." Pet. Br. 14, quoting *Simpson*, 435 U.S. at 14-15. Petitioner's conclusion is a non sequitur. The Dominick amendment predicated liability on the mere

2. As part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress revised Section 924(c) in several respects.[15] In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors within the statute's ambit while excluding non-violent felonies. See S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9

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fact of being armed, rather than on the use of a firearm in the commission of a felony; Congress's decision to adopt the latter approach means at most that Congress wanted to punish those individuals who use firearms to commit felonies but not those individuals who happen to be armed with a firearm that has no role in or connection to the underlying offense. Nothing about that choice sheds any light on the question whether the facially broad term "uses" must be construed as if it read "uses as an offensive weapon."

[15] The 1984 amendment to Section 924(c) read as follows:

(c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(1983). Additionally, Congress deleted the requirement that the firearm be carried "unlawfully," and substituted the requirement that the firearm be used or carried "in relation to" a predicate offense.[16]

The 1984 amendment also made clear that the mandatory sentence provided for in Section 924(c) was to be served prior to the start of the sentence for the underlying offense. Addressing this change, the Senate Judiciary Committee report explained that "[f]or example, a person convicted of armed bank robbery in violation of section 2113(a) and (d) and of using a gun in its commission (for example by pointing it at a teller or otherwise displaying it whether or not it is fired) would have to serve five years * * * before his sentence for the conviction under section 2113 (a) and (d) could start to run." S. Rep. No. 225, *supra*, at 313-314 (footnote omitted).

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[16] The Senate Judiciary Committee had recommended eliminating the requirement that the firearm be carried "unlawfully" when it considered a recodification of the federal criminal code in 1981. The Committee explained at that time that "the purpose of this section [924(c)] is to create a separate basis of criminal liability for the possession or employment of any firearm * * * in the commission of a crime because of the potential danger posed to human life by such conduct." S. Rep. No. 307, 97th Cong., 1st Sess. 890 (1981). "In the Committee's view, the mere carrying or possession of a firearm * * * during the commission of a crime indefensibly increases the risk of danger to other persons and [therefore] should be discouraged by penal sanctions." *Ibid.* These statements of the Senate Judiciary Committee provide further evidence of Congress's understanding of the scope of Section 924(c)(1) and indicate that the statute was intended to deter any employment of a firearm in a criminal enterprise because of the resulting increased danger to victims and bystanders.

Petitioner seizes on the Senate report's armed-bank-robbery example to support his argument that Congress intended Section 924(c)(1) to be limited to instances involving the actual use of a firearm as an offensive weapon. Pet. Br. 13. Petitioner's reliance on the bank-robbery example, however, is misplaced. The purpose of the example was merely to illustrate how the new consecutive sentencing provision added by the 1984 amendment was to apply. There is no indication that the passage was intended to define the scope of the statutory term "uses." Nor did the passage purport to be restrictive. On its face, the passage indicated that pointing or displaying a firearm was merely one "example" of how a gun could be used in a bank robbery. It did not suggest that the example was the only way in which a firearm could be "use[d]" within the meaning of Section 924(c)(1).[17]

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[17] The fact that the legislative history of the 1984 amendment does not expressly mention the exchange of firearms for drugs as another way of "us[ing]" a firearm provides no support for petitioner's conclusion that Congress intended to exclude such "uses" from the statute's scope. In the first place, Congress would have needed considerable prescience to anticipate the relevance of such a discussion at the time of the 1984 amendment; that amendment did not even apply to drug trafficking crimes, but was instead limited to crimes of violence. Moreover, as this Court has repeatedly reaffirmed, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); see, *e.g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980); *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980); accord *United States* v. *Phelps*, 895 F.2d at 1284 (Kozinski, J., dissenting from denial of rehearing en banc) ("Congress need not contemplate every factual permutation to which its statutes are likely to apply").

Petitioner also relies upon a footnote in the Senate report that immediately follows the passage discussed above. That footnote provides in part:

> *Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm* in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. The requirement in the present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act. * * * The Committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance. Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and

> never displayed or referred to in the course of a pugilistic barroom fight.

S. Rep. No. 225, *supra*, at 314 n.10 (emphasis added).

The italicized portion of the footnote discusses only the scope of liability under the "carries" prong of the statute, but petitioner apparently draws from it the implication that a defendant cannot be guilty of "us[ing]" a firearm unless he has actually "'display[ed] it, or refer[red] to it.'" Pet. Br. 13. The footnote in fact says nothing of the kind; to the contrary, the only portion of the footnote that discusses the scope of the term "uses" (*i.e.*, the last sentence of the footnote) states that liability would be inappropriate where the gun's "presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." The clear implication of that statement is that Congress contemplated that the amended statute would apply in situations in which, as in this case, the firearm "played [a] part in the crime." See *United States* v. *Phelps*, 895 F.2d at 1283-1284 (Kozinski, J., dissenting from denial of rehearing en banc).

Even if petitioner's reading of the footnote were correct, and even if the footnote were entitled to weight in construing the meaning of the term "uses" as first enacted by Congress in 1968 (but see *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980)), it is difficult to understand what solace petitioner finds in the italicized language. Petitioner *did* "display" and "refer to" his MAC-10

machinegun in the course of conspiring and attempting to possess cocaine with the intent to distribute it; in fact, the machinegun was the "currency" that he intended to use to commit the crime. Whatever the precise limits on the scope of the term "uses," petitioner's conduct falls well within them, and nothing in the legislative history of the 1984 amendment leads to a contrary conclusion.[18]

3. In 1986, as part of the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104, 100 Stat. 457, Congress further amended Section 924(c)(1) by "mandating that a person who uses or carries a firearm during and in relation to a drug trafficking crime shall be subject to a mandatory prison term of

[18] To support its holding that Section 924(c)(1) applies only to the use of a firearm as an offensive weapon, the Ninth Circuit in *United States* v. *Phelps* relied on the same footnote in the committee report and drew from it the conclusion that "Congress directed the statute at 'persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'" *Phelps*, 877 F.2d at 30, quoting S. Rep. No. 225, *supra*, at 314 n.10. The footnote, however, does not support the *Phelps* court's conclusion. The passage quoted by the *Phelps* court was intended to explain why Congress had originally required that a firearm be carried "unlawfully" in order to constitute a violation of the "carries" prong of Section 924(c)(1). It was not addressed to the meaning of the term "uses," and it thus sheds no light on the proper interpretation of that term. In any event, it is of little consequence what the Senate Judiciary Committee in 1983 may have thought Congress meant in 1968 when it imposed liability on persons who "use[]" firearms; "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 118 n.13; see also *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. at 168.

five years." H.R. Rep. No. 495, 99th Cong., 2d Sess. 2 (1986). The amendment further authorized a ten-year mandatory prison term for using or carrying a machinegun during and in relation to a crime of violence or a drug trafficking offense and a mandatory 20-year term for any subsequent offense. *Ibid.*[19]

The House Judiciary Committee's report on FOPA explained that a principal purpose of the legislation was to "fight violent crime and narcotics trafficking," and in particular to "[p]rovide an important new weapon against narcotics traffickers." H.R. Rep. No. 495, *supra*, at 1, 2. The report added that the law enforcement provisions of FOPA were a response to "the need for more effective protection of law enforcement officers from the proliferation of machine guns and high powered 'assault-type' weapons that are increasingly being used by criminals." *Id.* at 7.

Petitioner's conduct falls squarely within the scope of the evil Congress sought to deter in adopting the 1986 amendment to Section 924(c). After first discussing the sale of his weapon to another drug dealer, petitioner offered his "fully automatic MAC-10" and an accompanying silencer to an undercover officer posing as a drug dealer in exchange for two ounces of cocaine. J.A. 17. Had the facts been as petitioner believed them to be and had the exchange been consummated, petitioner would have succeeded in arming a drug dealer with one of the most lethal weapons in the arsenal of the nation's criminal element, a weapon

[19] The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4373, further amended Section 924(c) by substituting a mandatory 30-year sentence for the ten-year sentence authorized by the 1986 amendment. Petitioner's 30-year sentence was imposed pursuant to that provision.

particularly favored by drug dealers for its compactness, high rate of fire, and lack of a discernible report when equipped with a silencer. See *United States* v. *Phelps*, 895 F.2d at 1285 (Kozinski, J., dissenting from denial of rehearing en banc). Thus, even though petitioner may not have used the MAC-10 machinegun as a weapon, his use of the firearm as an item of barter for drugs created precisely the type of risk the amended statute was designed to deter. As the District of Columbia Circuit observed in addressing an almost identical situation:

> It may well be that Congress, when it drafted the language of section 924(c), had in mind a more obvious use of guns in connection with a drug crime, but the language is not so limited, nor can we imagine any reason why Congress would not have wished its language to cover this situation. Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society.

United States v. *Harris*, 959 F.2d at 262. Thus, the legislative history of the 1986 amendment, which illustrates Congress's concern about the proliferation of dangerous firearms, further confirms that Section 924(c)(1) applies to the exchange of firearms for drugs.

C. The Rule Of Lenity Has No Application In This Case, Because The Statute Is Not Ambiguous

Petitioner contends (Pet. Br. 14) that to construe Section 924(c)(1) to embrace the use of a firearm as a medium of exchange would violate the principle that ambiguity in the scope of criminal statutes must

be resolved in favor of lenity. The rule of lenity, however, is not applicable in this case.

The rule of lenity comes into play only when, after "[a]pplying well established principles of statutory construction" (*Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 849 (1991)), there is still a "grievous ambiguity or uncertainty in the language and structure of the Act." *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). See, *e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) ("The Court has emphasized that the 'touchstone' of the rule of lenity 'is statutory ambiguity.' "). Thus, the rule of lenity is applicable, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 111 S. Ct. at 849 (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)).

There is no ambiguity here. The term "uses" and the phrase "in relation to," as they appear in Section 924(c)(1), embrace any employment of a firearm that facilitates a drug trafficking offense, and the legislative history confirms that interpretation. The language of the statute, therefore, amply "provide[s] fair warning concerning conduct rendered illegal." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). See also *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) (refusing to apply rule of lenity because "the critical statutory language * * * is not sufficiently ambiguous * * * to permit the rule to be controlling").

It is, moreover, inconsequential to the application of the rule of lenity that the term "uses" or the phrase "in relation to" may be susceptible to a more restrictive interpretation. As the Court recently explained:

> Because the meaning of language is inherently contextual, we have declined to deem a statute "ambiguous" for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one. Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute.

Moskal v. *United States*, 111 S. Ct. 461, 465 (1990) (citations omitted); see *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1338 & n.6 (1992) (plurality opinion).

Finally, the result reached by the court of appeals in this case is not "so 'absurd or glaringly unjust'" (*United States* v. *Rodgers*, 466 U.S. at 484) as to call into question Congress's intent.[20] To the contrary, the

[20] Petitioner posits a hypothetical case in which a drug dealer exchanges drugs for a pawn ticket that is redeemable for a firearm at a subsequent time. Pet. Br. 15. That hypothetical case, which petitioner maintains is comparable to the instant case, demonstrates, in his view, that application of the term "uses" to an exchange of a firearm for drugs "would create an absurd result clearly not within the intent of Congress." *Ibid.* Petitioner's hypothetical case, however, is quite unlike this case. A defendant who has physical possession and control of a firearm and attempts to trade it for drugs after displaying it to the intended buyer has "use[d]" the firearm within any reasonable interpretation of the term, whereas it is at least open to question whether the exchange of a pawn ticket constitutes "use[]" of the pawned item as that term is ordinarily understood. In any event, it is far from "absurd" to impose enhanced penalties on persons who knowingly place dangerous weapons in the hands of drug dealers, and on the drug dealers who seek and obtain those weapons.

legislative history of Section 924(c), as it evolved into its present form, demonstrates that the purpose of the statute was to deter any employment of firearms during and in relation to a drug trafficking crime—a purpose that reaches the conduct at issue in this case. Under these circumstances, the rule of lenity has no role.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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